TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1076.

PHILADELPHIA BAR ASSOCIATION

N. A. COWDREY, APPELLANT,

vs.

J. V. W. VANDENBURGH, H. L. CRANFORD, AND L. S. FILBERT, AS J. V. W. VANDENBURGH & CO.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 17, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 1076.

N. A. COWDREY, APPELLANT,

vs.

J. V. W. VANDENBURGH, H. L. CRANFORD, AND L. S. FILBERT, AS J. V. W. VANDENBURGH & CO.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Original bill	1	1
Demurrer	13	7
Amended bill	14	7
Amendment to original bill	16	8
Pro confesso	18	9
Answer of N. A. Cowdrey	19	10
Replication	26	14
Depositions	27	14
Depositions, exhibits to	32	17
Pro confesso vs. certain defendants and decree *vs.* defendant Cowdrey	35	19
Appeal to general term	36	19
Decree in general term	37	20
Appeal to Supreme Court United States	37	20
Appeal bond	38	21
Clerk's certificate	40	21

1 In the supreme court of the Dist. of Columbia.

J. V. W. VANDENBURGH, H. L. CRANFORD, L. S. Filbert, trading as J. V. W. Vandenburgh & Co.,
vs.
M. MANDEL, THE DISTRICT OF COLUMBIA, Wm. Dennison, Henry T. Blow, J. H. Ketcham, R. W. Tayler, J. M. Broadhead, W. W. Corcoran, Henry M. Sweeny, Lewis J. Davis, Moses Kelly, and Fitzhugh Coyle.

In equity. No. 3969. Doc. 14.

To the supreme court of the District of Columbia sitting in equity:

The plaintiffs complain—

1. That they are citizens of the United States, and trading and doing business together in the District of Columbia under the firm name of J. V. W. Vandenburgh & Co.

2. That, as they are informed, the defendant, M. Mandel, is a citizen of the United States, and his last known residence was in the District of Columbia, and he is sued individually.

2 3. The District of Columbia is the title of a local government, assuming to be created in and for said District, under and by virtue of a part of the 8th section of the 1st article of the Constitution of the United States, which provides that Congress shall exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may by cession of particular States and acceptance by Congress become the seat of government of the United States, and under and by virtue of an act of Congress entitled "An act to provide a government for the District of Columbia," approved February 21st, 1871, and an act of Congress entitled "An act for the government of the said District of Columbia, and for other purposes," approved June 20th, 1874.

4. The defendants, Wm. Dennison, Henry T. Blow, and J. H. Ketcham are Commissioners of or for the said District, appointed under and in pursuance of the act of Congress last before referred to, with specified and limited powers, and upon whom, or either of them, process may be served in all suits against the said District, as will fully appear by reference to the said act.

5. The defendants, R. W. Tayler and J. M. Broadhead, are respectively the First and Second Comptrollers of the Treasury of the United States, and are a board of audit created by the 6th section of the said act of Congress of June 20th, 1874, and are sued in their official capacity.

6. The defendant, Fitzhugh Coyle, is the comptroller of the said District of Columbia, and a citizen of the United States and of said District.

7. The defendants, W. W. Corcoran, H. M. Sweeny, Lewis J. Davis, and Moses Kelly are commissioners of the sinking fund of the District of Columbia, designated and continued by the 7th section of the said last mentioned act of Congress, and are also sued in their official capacity.

3 8. The plaintiffs, on or about the 27th of January, 1874, were the owners, and had in their possession certain papers, commonly called certificates of the board of public works of said District, signed by the auditor of said board, which certificates were issued to the said J. V. W. Vandenburg & Co., on account of work done by them in the said

District of Columbia, under and by virtue of contracts in writing with said board, to wit, certificate No. 360 S street, bet. 14th & 15th sts., N. W., dated January 21st, 1874, for $1,534.80. Certificate No. 390 14th street, between N. Y. avenue and H street, N. W., dated January 21, 1874, for $4,956 80. Certificate No. 4351 (Letter A), 13th street circle, N. W., dated Decr. 6th, 1873, for $6,000.00.

9. That, being the owners and possessors of the said certificates, the plaintiffs applied to the defendant, Mandel, for certain sums of money of which they were in need, and obtained from him the sum of five thousand dollars ($5,000.00), and delivered to the said Mandel, the said certificates to be held and retained by him for the period of six months, when the said money was to be repaid, and the said certificates returned, to wit, on the 30th of July, 1874.

10. That on the 30th of July, 1874, the plaintiffs called at the last place of business of the said Mandel, in the District of Columbia, to wit, No. 1213 Pennsylvania avenue, N. W., Washington, D. C., which, on the said 27th day of January, 1874, and afterward, was the place of business of the said Mandel, with the said sum of $5,000.00, and the accrued interest thereon, for the purpose of paying the same to the said defendant, and obtaining from him the said certificates according to the said agreement and arrangement between them, but after diligent inquiry and examination, could not find the said Mandel, or any person representing him, or acting for him, and the plaintiffs have ascertained, and upon information and belief aver, that soon after the said deposit of the said certificates with him, the said Mandel left the
4 said District clandestinely, and has not since returned, nor did he leave any person in charge of his business, nor any information as to where he could be found, or addressed, or communicated with; and the said plaintiffs did also, at the said date, have the said money on deposit for the especial purpose of paying the same, and redeeming and receiving the said certificates, but the plaintiffs were unable to pay the said money, or sum, and take up and receive the said certificates by reason of their inability to find the said Mandel, or any person acting for him, as aforesaid.

11. That at the time the said money was advanced, and the said certificate deposited as aforesaid, the said Mandel designed and intended to violate the said agreement and arrangement, and to dispose of the said certificates for the purpose of cheating and defrauding the plaintiffs, and that, in pursuance of such design and intention, he, the said Mandel, instead of retaining the said certificates to be held by him, and delivered to the plaintiffs on the payment of the amount so advanced or loaned, as aforesaid, secretly, and without the consent or knowledge of the plaintiffs, or either of them, disposed of, or delivered the said certificates to some person or persons to the plaintiffs unknown, who were conniving and co-operating with him, the said Mandel, for the wrongful and fraudulent purpose aforesaid, and by whom, or by some other person or persons, to the plaintiffs unknown, the said certificates are now wrongfully held or claimed, and being used, or attempted to be used.

12. That the certificates aforesaid are substantially in the following or similar form, viz:

No. 360.]

OFFICE OF THE AUDITOR BOARD OF PUBLIC WORKS,
Washington, D. C., Jan'y 21st, 1874.

I hereby certify that I have this day audited and allowed the
5 account of J. V. W. Vandenburgh & Co., for work on S street,

between 14th and 15th streets, N. W., amounting to one thousand five hundred and thirty-four dollars and eighty cents.

$1,534.80.

J. C. LAY, *Auditor.*

And were, and are simply acknowledgments or evidence of indebtedness issued as such, by the direction of the late board of public works, that no law of the United States, or of the said District of Columbia, required the issuing thereof, and that neither in form nor otherwise, were or are they negotiable, either by delivery or endorsement, and they can only be transferred by a proper and regular assignment in writing duly executed; that this was not done with, upon, or in respect of the certificate so deposited by the plaintiffs as aforesaid, and that any attempted transfer or delivery or any disposition made of the same by the said defendant, Mandel, or by any person or persons for him, was, and is utterly void, and the holders or pretended holders or claimants thereof have no legal interest or right thereto or therein, or to any proceeds thereof, or money due thereon, or to any certificate or other paper of value which may be or can be issued in consequence of the existence and possession of the said certificate under the act of Congress of the United States, entitled "An act for the government of the District of Columbia," approved June 20th, 1874, or any other act of said Congress, or otherwise, and that the plaintiffs are the true and lawful and only owners of said certificates, and alone entitled to the possession of the same, and to any payments thereon, or to any certificate bonds or other paper or papers which have been, or may be issued in lieu thereof, or be authorized to be issued by said act of Congress, approved June 20th, 1874, or otherwise.

6 13. That when the certificates aforesaid were issued, the act of Congress entitled "An act to provide a government for the District of Columbia," approved February 21st, 1871, was in full force and effect, and the affairs of the said District conducted and controlled accordingly, and that by said act, the government of said District was chiefly vested in a governor, and a legislative assembly consisting of a council, and a house of delegates, and a board of public works, having entire control over the avenues, streets, alleys, and sewers of the said District, and possessing other specified and enumerated powers, the members of which board were appointed by the President of the United States, and confirmed by the Senate.

14. That by an act of Congress of the United States, entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20th, 1874, this form of government has been largely changed, and the said office of governor, the legislative assembly, and the board of public works abolished, and all the power theretofore possessed by the governor of said District and by the said board of public works have been vested in three Commissioners, created and authorized by said act as aforesaid, except so far as said powers are especially limited by said act.

15. That the board of audit of the said District, composed of the First and Second Comptrollers of the Treasury of the United States as aforesaid, is by the said act directed and required to give notice by publication, in such manner as they may deem necessary for the presentation of the claims against said District and the said board of public works, which are designated in said act, for the period of ninety days; and, among other things, to examine and audit for settlement the debt purporting to be evidenced and ascertained by certificates of the auditor of

the board of public works of said District, and to make a tabular and detailed statement thereof, as the same may be presented to
7 them, and of the persons or corporation owning the same, and the amount found to be due thereon, and to issue to the owner, or just and legal claimant, a certificate, signed by each of the members of said board, stating the amount found due to such owner and claimant.

16. That said last mentioned certificate issued by the said board of audit are required to be countersigned by the comptroller of said District.

17. That the said commissioners of the sinking fund are authorized to issue or cause to be issued bonds of the District of Columbia, in sums of fifty and five hundred dollars, bearing date August 1st, 1874, payable fifty years after date with interest at the rate of three and sixty-five hundredths per centum per annum, payable semi-annually, to be signed by the secretary and treasurer of the said sinking fund commissioners, and countersigned by the comptroller of said District, and sealed as the said board may direct, and among other things, to exchange said bonds at par for like sums of indebtedness, evidenced and ascertained by certificates of the auditor of the board of public works, aforesaid, so far as the same may be examined, and found correct by the said board of audit, and so far as certificates therefor may be issued to the owner of such indebtedness by said board of audit, and be countersigned by the comptroller of said District.

18. That the said notice as required by the 6th section of the said act of Congress was duly published by the said board of audit, and the said board has since, about the 9th day of July, 1874, been receiving claims as aforesaid, for examination, audit settlement, and issuing of certificates as aforesaid; that the time limited for the presentation of such claims in the said notice expired on the 7th day of October, 1874.

19. That from the information and belief of the plaintiffs, the said certificates so deposited by them, with the said Mandel, have
8 been presented by the agents or attorneys of said defendant, Mandel, or the person or persons, or association or corporation unknown, into whose possession the same were passed or delivered by said defendant for audit and certificates as aforesaid, or will be presented to said board for that purpose, and with the further purpose of thereafter obtaining money therefor, from the said District, or its representatives, agent, or attorney, or bonds from the said commissioners of the sinking fund, and converting the same to his or their own use, and so as to deprive the plaintiffs of their interest therein, and their right thereto, and to carry out the fraudulent design of said Mandel and his associates unknown, to injure, wrong and defraud the plaintiffs as aforesaid, and that it is the purpose and design of the said board of audit to examine and audit said certificates in favor of the person or persons who may have presented, or who may present the same to said board without reference or regard to the true ownership thereof, or consideration of the plaintiffs' claim and right thereto.

20. The plaintiffs since the said 30th day of July, 1874, have been, and now are ready and willing to pay the amount due the said defendant, Mandel, and now offer to pay the said amount into court on the return of the said certificates, or delivery of them to the plaintiffs by the order of the court, or on the delivery to them of any papers substituted therefor by the board of audit aforesaid, or any person authorized to do so.

21. To the end, therefore, that the said Mandel, and his confederates

when discovered, as well as the other defendants, or any or either of them, if they can, may show why the plaintiffs should not have the relief herein sought and prayed, and may upon their several respective and corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several
9 interrogatories, hereinafter numbered and set forth, as by the note hereunder written, they are required to answer, that is to say:

(*a.*) What disposition has been made of the said certificates of the the auditor of the late board of public works herein before described, Nos. 360, 390, and 4351?

(*b.*) Have the said certificates been transferred to any person or persons, or been in any manner passed into the possession or custody of any individual association or corporation; if so, when, to whom, and by whom?

(*c.*) In whose custody or possession are the said certificates now?

(*d.*) Have the said certificates been presented to the said board of audit, or to any person in their employment, for examination, or audit, or settlement, and, if so, when, and by whom, or by what association or corporation, and in what form?

(*e.*) If the said certificates have been presented to said board of audit, or to any person in their employment, what action, if any, has been taken in relation thereto, and what action is it proposed by said board to take?

(*f.*) If the said certificates have been presented to the said board of audit as aforesaid, are the same in its original form, or accompanied by any evidence of ownership on the part of the person, association, or corporation, presenting the same; if so, what is it?

(*g.*) Have certificates, or a certificate of the said board of audit, based on the said certificates of the auditor of the said board of public works, been presented to be signed, or countersigned by the comptroller of the District of Columbia; if so, when, and by whom, and what has been done in this respect in relation to the same?

10 (*h.*) Have certificates or certificate of said board of audit, been issued for or on account of the said certificates of the auditor of the board of public works, to any person, or association, or corporation; and if so, have said certificate or certificates been presented to the commissioners of the sinking fund, or any person in their employment, for exchange into bonds of the District: if so, when, and by whom, and has any such exchange been made?

(*i.*) Have the certificates aforesaid, of the auditor of the board of public works, been lifted, exchanged, or in any manner paid by the District of Columbia, or by the commissioners thereof, or by any appointee, or officer thereof; if so, how, when, where, and to whom? And is it the purpose of said District or commission, or of any one acting for it, to lift, pay, or exchange any of said certificates in any manner?

22. That in view of all the facts and allegations aforesaid, the plaintiffs are without any adequate remedy at law by which they may be protected from the manifest wrongs and injuries aforesaid, and can only have full, fair, and complete relief in equity.

The plaintiffs therefore pray as follows:

1. That the defendant, M. Mandel, his agents, representatives, attorneys, and assignees, may be restrained from claiming or retaining the said certificates issued to the plaintiffs as J. V. W. Vandenburgh & Co., by the auditor of the late board of public works, and that said

certificates be declared to be the property of the plaintiffs, and that the same may be ordered and decreed to be delivered into the possession or control of the owners thereof.

2. That the defendant, M. Mandel, his agents, representatives, attorneys, and assigns, may be restrained from receiving from the defendants, R. W. Tayler and J. M. Broadhead, composing the board of audit as aforesaid, or either of them, or any one for them, any cer-
11 tificate which they may issue, or execute in lieu of the said certificates of the auditor of the late Board of Public Works, or in anywise arising out of, or connected therewith.

3. That the said District of Columbia, its officers, representatives, agents and attorneys, be restrained from paying said certificates to said defendant, Mandel, his representatives, agents, attorneys or assignees, and from in any manner recognizing his or their pretended rights thereto.

4. That the board of audit aforesaid, be restrained and enjoined from regarding and treating said defendant, Mandel, or any person, association or corporation acting for him, or in any manner under him by delivery, assignment, or otherwise, as the owner or true claimant of said certificates, and from issuing to him, them, or any of them any certificate of indebtedness arising out of the said certificates of the auditor of the late board of public works, or in any manner connected therewith.

5. That the comptroller of the District of Columbia be restrained from countersigning any certificate which has been, or may be issued to said defendant, Mandel, based on the said certificates of the auditor of the late board of public works, or to any person, association, or corporation acting for him, to whom the same may have been in any manner, or at any time delivered or transferred.

6. That the defendants, W. W. Corcoran, Henry M. Sweeny, Lewis J. Davis, and Moses Kelly, the commissioners of the sinking fund, be restrained and enjoined from issuing any bond or bonds to any person or person on account of any certificate or certificates which have been or may be issued by the board of audit aforesaid, for, or on account of any indebtedness of the District of Columbia, or of the late board of public works, arising out of the said certificates of the auditor of the said board of public works.

12 7. That the said certificates of the auditor of the late board of public works be required to be brought into court, and on payment into court of the amount due said defendant, Mandel, that the same be delivered to the plaintiffs, or if the said certificates have been audited, or are being examined and audited by the said board of audit, that the certificate issued or to be issued by the said board of audit, be required to be brought into court for delivery as aforesaid, to the said plaintiffs, as well as any bonds which may be issued based upon such audit, or upon said certificates.

8. And for such other and further relief as the nature of the case may require, and to the court shall seem proper.

9. And, to this end, may it please this honorable court to grant unto the plaintiffs, writs of subpœna, directed to said defendants, M. Mandel, District of Columbia, William Dennison, Henry T. Blow, J. H. Ketcham, R. W. Tayler, J. M. Broadhead, Fitzhugh Coyle, W. W. Corcoran, Lewis J. Davis, Henry M. Sweeney and Moses Kelly, commanding them, and each of them, at a certain time, and under a certain penalty therein to be mentioned and limited, to appear before this honorable court, and then and there, full, true, direct and perfect answer make to all and singular the premises, and further, to stand to, perform

and abide such further order, direction and decree therein, as to this honorable court shall seem meet.

And they will pray, &c.

H. L. CRANFORD.

13 DISTRICT OF COLUMBIA:

H. L. Cranford, one of the plaintiffs herein, being duly sworn according to law, makes oath that all matters and things which are stated in the foregoing bill, as of personal knowledge, are true, and those stated upon information and belief he verily believes to be true.

H. L. CRANFORD.

Subscribed and sworn to before me this 19th day of October, A. D. 1874.

[SEAL.] THOMAS S. HOPKINS,
Notary Public.

Filed October 20, 1874.

Here follows:

Subpœna to answer original bill and restraining order.
Issued October 20, 1874.
Returned October 22, 1874.

Demurrer to bill.

In the supreme court of the District of Columbia.

J. V. W. VANDENBURGH ET AL., COMPL'TS,
vs.
M. MANDEL ET AL., DEF'TS. } In equity. No. 3969.

And now come R. W. Tayler and John M. Broadhead, summoned as defendants in said suit, as the board of audit, and say that the said
14 bill and the matters and things therein set forth are not sufficient to entitle the complainants to any answer, relief, or discovery as against these defendants. Wherefore they pray judgment whether they shall be compelled to make any further or other answer to said bill of complaint or any of the matters and things therein contained and set forth, and that they may be hence dismissed with their reasonable costs.

R. W. TAYLER.
J. M. BROADHEAD.

Filed October 23, 1874.

Amended bill of complaint.

In the supreme court of the District of Columbia

J. V. W. VANDENBURGH, H. L. CRANFORD, and L. S. Filbert, trading as J. V. W. Vandenburgh & Co.
vs.
M. MANDEL ET AL. } No. 3969. Eq. doc. 14.

The said complainants come, and, leave of the court first being had thereto, do amend their said bill of complaint by adding thereto the

name of N. A. Cowdrey as a party defendant to the said bill, and further say:

1. That the said N. A. Cowdrey is at this time, as the complainants are informed and believe, within the District of Columbia, but resides in the city of New York.

2. The complainants are informed and believe, and so aver, that the said N. A. Cowdrey claims to be the owner of the certificates of the auditor of the late board of public works mentioned and described in the said original bill of complaint as certificates numbered three
15 hundred and ninety (390) and four thousand three hundred and fifty-one (letter A), (4351*a*), and in fraud of the lawful rights of the complainants is claiming and seeking to possess himself of the proceeds of the said certificates; that he is claiming and demanding from the said board of audit of the District of Columbia the certificates issued or to be issued by the said board in lieu of the said certificates Nos. 390 and 4351 (*a*) of the auditor of the late Board of Public Works, and that he is claiming and demanding, or about to claim and demand from the said commissioners of the sinking fund the bonds to be issued upon or in lieu of such certificates in fraud of the lawful rights of the complainants, and to their great wrong and injury.

The complainants therefore pray—

1. That the said N. A. Cowdrey be made a party defendant to the said original bill of complaint and be required to answer the same as fully as if the same were here again fully and at large set forth.

2. That the said N. A. Cowdrey, his agents, attorneys, and representatives, be enjoined and restrained from receiving from the defendants R. W. Tayler and J. M. Broadhead, comprising the board of audit as aforesaid, or either of them, or any one for them, or from the said commissioners of the sinking fund, or either of them, or any one of them, any certificate or certificates, bond or bonds, or other evidence of indebtedness which they, or either or any of them may issue or execute in lieu of the said certificates of the auditor of the late board of public works Nos. 390 and 4351 (*a*), or either of them, or in anywise arising therefrom or connected therewith.

3. That the usual writ of subpœna may issue to the said N. A. Cowdrey, &c.

16 4. And for such other and further relief as to the court may seem proper, &c.

JAMES G. PAYNE,
Sol'r for Compl'ts.

I do solemnly swear that the matters and things herein stated as of personal knowledge are true, and those stated upon information and belief I verily believe to be true.

J. V. W. VANDENBURGH.

Subscribed and sworn before me this 17th day of November, 1874.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk.

Here follows—
Subpœna to answer amended bill and restraining order.
Issued November 23, 1874.
Returned March 5, 1375.

Amendment to original bill.

In the supreme court of the District of Columbia.

J. V. W. VANDENBURGH ET AL.
vs.
M. MANDEL ET AL.
No. 3969. Eq. doc. 14.

The complainants come and amend their original bill of complaint, and thereupon say—

1. That H. L. Horton, Davis Johnson, and Frederick T. Brown
17 are residents of, or are doing business in the city of New York, and compose the firm of H. L. Horton & Co., and that they ought to be made parties defendant to the original bill of complaint in this cause.

These complainants are informed and believe, and therefore aver that the said H. L. Horton & Co. claim to be the owners of the certificate of the auditor of the late board of public works mentioned and described in the said original bill of complaint as certificate numbered three hundred and sixty (360), and in fraud of the lawful rights of the complainants are claiming and seeking to possess themselves of the proceeds of the said certificate, or have already, and since the institution of this suit, received a portion of the proceeds of the said certificate, and are claiming and demanding the remainder of the said proceeds in fraud of the lawful rights of the complainants, and to their great wrong and injury.

The complainants therefore pray—

1. That the said H. L. Horton, Davis Johnson, and Frederick T. Brown be made parties defendant to the said original bill of complaint, and be required to answer the same as fully as if the same were here again set forth fully and at large, and that they be required to answer and show what portion of the said certificate or of the proceeds thereof have been received by them, or either of them, or by any one of them.

2. That the said H. L. Horton, Davis Johnson, and Frederick T. Brown, their agents, attorneys, and representatives, be enjoined and restrained from receiving any of the proceeds of the said certificate, or arising therefrom, or in any manner connected therewith.

3. That the said defendants to the original bill, R. W. Tayler and J. M. Broadhead, answer and show what portion, if any, of the proceeds of the said certificate have been delivered to the said H. L. Horton & Co.,
or to any other person or persons, and when, and to whom; and
18 that the complainants may have judgment against the said H. L. Horton, Davis Johnson, and Frederick T. Brown for such portion of the proceeds of the said certificate as may have been received by them, or to their use or benefit, with interest on the same.

And for such further relief as to the court may seem meet.

And for the usual writ of subpœna, &c.

JAMES G. PAYNE,
Sol'r for Compl'ts.

Filed October 21, 1875.

Here follows:
Order for appearance of absent defendant.
Issued October 27, 1875.

Decree pro confesso against certain of defendents.

In the supreme court of the District of Columbia.

J. V. W. VANDENBUGH ET AL.
vs.
M. MANDEL ET AL. } 3969. Equity doc. 14.

It appearing to the court that publication of the summons in this cause against N. A. Cowdrey, H. L. Horton, D. Johnson, and F. T. Brown, defendants, has been duly made, as required by the order passed herein, on the 27th day of October, 1875, and that neither of the said defendants have appeared or answered, it is, this 21st day of December, A. D. 1875, ordered, adjudged, and decreed that the matters and things alleged and set forth in the said original and amended bills of complaint in this cause filed be taken for confessed against the said defendants, N. A. Cowdrey, H. L. Horton, D. Johnson, and F. T. Brown.

By the court.

A. WYLIE, *Justice.*

Filed December 21, 1875.

19 *Answer of N. A. Cowdrey.*

Supreme court, District of Columbia.

J. V. W. VANDENBURGH AND OTHERS
vs.
M. MANDEL AND OTHERS, N. A. COWDREY, impleaded by amended bill, filed November 17, 1874. } In equity. No. 3969. Doc. 14.

Answer of N. A. Cowdrey, one of the defendants, impleaded in the above entitled cause.

This defendant answers and says, that the first knowledge he had of this suit was conveyed to him by Messrs. Bradley and Duvall, at the city of Washington, on the 22nd day of January, 1876; that he is a citizen of the city and State of New York, and has an office or place of business in said city, at 25 William street, and has so had an established place of business at said No. 25 William street, for more than ten years last past; that he fully believes that had any notice of this suit been sent to him by mail he would have received it in due course of mail; that the only business day which he has been absent from said office for more than a year last past, was on said 22nd day of January, 1876. Wherefore, he prays the court to be allowed to file this, his answer to said complaint, now for then.

Answer.

The defendant, N. A. Cowdrey, answering said complaint, or so much thereof as he is advised it is material he should answer, says:

That he has no knowledge of the complainants, whether they are citizens of the United States, or co partners.

20 That he has no knowledge whatever of the defendant, M. Mandel.

That the defendant, N. A. Cowdrey, has no knowledge whatever, and

never has had, of any transactions between the plaintiffs, or either of them, and the defendant, M. Mandel, or any other party to this suit, and upon information and belief, this defendant denies that said plaintiffs ever borrowed money from said Mandel and gave as security said certificates as set forth in said bill of complaint; and avers, upon information and belief, that in fact, whatever the relations were between said plaintiffs, or said defendant, Mandel, that in this matter the said plaintiffs sold and assigned said certificates to said Mandel, or agreed to purchase the same, or a like amount of said certificates from said Mandel, which agreement the plaintiffs have not kept, and that said Mandel thereupon sold said certificates in open market for the most he could get therefor.

The said N. A. Cowdrey, defendant, as aforesaid, denies, on information and belief, the allegations contained in the 12th subdivision of the original bill, and to so much therefor as alleges "That neither in form nor otherwise were, or are, they (said certificates of debt) negotiable, either by delivery, or endorsement," and he avers that said certificates, No. 390 for $4,956.80, and No. 4351 for $6,000.00, were duly, legally and properly transferred and assigned in writing or printed words duly executed, signed and delivered by the plaintiffs, in words, as follows, upon the back of each of said certificates: "For value received, the within debt is assigned and transferred to N. A. Cowdrey, who is authorized to collect the same to his own use." Signed by J. V. W. Vandenburgh & Co.

That of and concerning certificate No. 360 for $1,534.80, this defendant knows nothing.

This defendant, upon information and belief denies the allegations contained in the 20th subdivision of the original bill of complaint,
21 and avers that the plaintiffs are insolvent and bankrupt, and have no credit or money to pay into court as alleged, and that until said money is actually paid into court, this suit is a mere speculative adventure, and hypothetical, for that if said claims should be adjudged in favor of said plaintiffs as prayed for, the plaintiffs have no ability to comply with their offer to pay the money into court; that the court should require them to comply with their offer and pay said money into court before they consider this cause further.

And this defendant, in answer to the several interrogatories propounded to *him*, upon his best information and belief, and upon his oath, says:

In answer to interrogatory (*a*). That he has no knowledge of certificate No. 360. That certificates Nos. 390 and 4351 (*a*), this defendant presented on or about July 16, 1874, to said board of audit, properly assigned and transferred by the plaintiffs to this defendant, for their audit; that said board audited said certificates of debt, and cancelled the same.

To interrogatory (*b*). The defendant has no knowledge of any such transfer or possession.

To interrogatory (*c*). The defendant does not know.

To interrogatory (*d*). They have. They were presented July 16, 1874, by this defendant, in the form above set forth, that is to say, properly assigned and transferred to this defendant, and together with a large number of similar certificates.

To interrogatory (*e*). The board of audit has audited them, and gave their certificates of said audit.

22 To interrogatory (*f*). The certificates are, or were, as above de-

scribed, that is to say, properly assigned and transferred in writing to this defendant.

To interrogatory (*g*). I believe it has. I cannot tell the date. I think it was in December, 1874.

To interrogatory (*h*). The certificates of the board of audit were presented to the sinking fund commissioners, and 3.65 bonds of the District of Columbia given therefor. I cannot tell the exact date. I think it was in December, 1874. This defendant presented the said certificates in person, and received the bonds in person.

To interrogatory (*i*). They have been paid by the District of Columbia in said 3.65 bonds.

This defendant, except so far as he has denied or admitted herein various allegations in said bill of complaint contained, says he has no information, knowledge or belief, on the other matters and things herein contained, and prays that the court may require the plaintiff to prove the same.

This defendant, further answering, says that it is wholly immaterial to the issue in this cause whether the said certificates, Nos. 390 and 4351, when endorsed and delivered by the payees, are, or are not, negotiable instruments, and whether the ownership does or does not pass by sale and delivery from hand to hand as commercial paper. The defendant avers that under the facts and circumstances of this case, he became the true and lawful owner of each of said certificates, Nos. 390 and 4351 (*a*), and of the indebtedness represented by said certificates, which had previously been issued and found to be due to the plaintiff by the District of Columbia, and afterward purchased as herein set forth by this defendant, and the same duly assigned and delivered to him by the said plaintiffs; that the plaintiffs are stopped from
23 denying such claims and ownership on the part of this defendant.

This defendant has no knowledge of any of the transactions between the plaintiffs and the defendant Mandel, and he, the defendant, avers that he is in no wise bound or affected by any of the transactions of the plaintiffs with said Mandel. That if the plaintiffs claim any of the allegations in the 20th section of the bill of complaint to be a tender of any money to or for the use of the defendant, it is the duty of the plaintiffs to bring the money so claimed to be tendered into court and deposit the same in the registry of the court, subject to the order and control of the court; that until the money is so deposited this suit is a mere hypothetical, speculative suit.

This defendant, further answering, says this defendant purchased said certificates Nos. 390 of $4,956.80, and 4351 of $6,000, upon joint account with Marcellus Hartly, of the city of New York; that on the 27th day of November, 1874, before the service of notice of the amended bill making the defendant a party, which amended bill was filed Nov. 17, 1874, and notice thereof claimed to have been given by an order of publication Oct. 27th, 1875, and without any knowledge on the part of this defendant either of said original or of said amended bill having been filed, this defendant, on said 27th day of November, 1874, settled said joint account with said Hartley, and sold and assigned all this defendant's interest in and to said certificates Nos. 390 and 4351 (*a*) and to the debt represented thereby, and to the resulting proceeds thereof to said Hartley.

That said Hartley and this defendant were on a casual visit to the city of Washington, District of Columbia; that said certificates of the board of public works and similar ones were offered for sale to them (the said Hartley and this defendant) by brokers and dealers, and they were

solicited to purchase the same; that they made full inquiries and learned that said certificates representing audited debts against the District of Columbia, and when endorsed by the payees therein named, passed from hand to hand in the market as merchantable or transferrable property, and that value of said certificates was daily
24 quoted at the stock exchange of the city of Washington, and that the holder of them, on presentation of said certificates at the proper department of the government of the District of Columbia, or board of public works, for settlement, was recognized there as the owner, and received from the District of Columbia the amount due thereon; that the amount of similar certificates issued by said board of public works was large, the defendant thinks about $7,000,000.00, and that there was a large traffic or trade in said certificates, the same passing from hand to hand by delivery when endorsed by the payees; that the trade and traffic was not confined to Washington, but was carried on in other cities, viz, Baltimore, Richmond, Philadelphia, Newark, Jersey City, and city of New York, and other places to the defendant unknown; that said facts had been known, and said trade in said certificates had been carried on for a long time previous to the purchase of the same being made by this defendant, the defendant thinks for years, all of which was well known and participated in by the plaintiff in this cause, and by many other payees of similar certificates, and also by many brokers, bankers, merchants, and others having money to invest or to use temporarily; that under these circumstances, this defendant and said Hartley purchased said certificates Nos. 390 and 4351 from a well known and responsible business man in the city of Washington, viz, Mr. L. L. Crounse, who resided and had an office in said city; that at the same time they purchased the above-named certificates they also purchased many thousand dollars of similar certificates in addition to said Nos. 390 and 4351 (*a*); that when the defendant received said certificates they were endorsed absolutely, unqualifiedly, and without limit or condition or any other token, sign, matter, or thing, to put the defendants upon inquiry, in the proper handwriting of one of the plaintiffs, in the name of the firm; that there was nothing upon or about said certificates to indicate that the plaintiffs had or retained any interest in the debt or money therein named, or that the plaintiffs had not transferred and assigned the amount therein named to be audited and due,
25 fully and absolutely, by such endorsement to the holder.

This defendant avers, that by said endorsement, so made by the plaintiffs upon each of said certificates, the plaintiffs authorized the defendant, as a holder for value of said certificates to write over their said endorsement of their name whatever might be necessary to perfect said title and interest in this defendant as such holder.

That this defendant purchased said certificates Nos. 390 and 4351 of said Crounse, and paid the full market value therefor, and received said certificates from him, said Crounse, and thereupon caused to be written or printed upon the back of each of said certificates over the endorsement of the plaintiffs, the payees therein named, as follows: "For value received the within debt is assigned and transferred to N. A. Cowdrey, who is authorized to collect the same to his own use." This defendant avers, upon information and belief, that the plaintiffs themselves signed a blank receipt upon the back of each of said certificates, acknowledging that they had received the amount due from James A. Magruder, treasurer of the board of public works for the District of Columbia, although of this latter averment he is not sure, having no distinct recollection of these two specific certificates Nos. 390 and 4351 (*a*), and

not having seen the same since July 16, 1874. This defendant avers that the plaintiffs do not allege that there are any equities existing between the District of Columbia, the makers of the certificates of debt, and themselves as the payees named therein, by which said debt is not fairly and equitable, as set forth in and by said certificates.

Wherefore the defendant, having fully answered, prays that the original and amended bill of complaint may be dismissed, with costs to this defendant. And the defendant, as in duty bound, will ever pray.

N. A. COWDREY.

JOSEPH H. BRADLEY,
Sol'r for Def't.

26 CITY AND STATE OF NEW YORK, *ss:*

N. A. Cowdrey, whose name is signed to the foregoing answer, makes oath according to law that he hath read and understands the same, and that the facts therein stated as of his own knowledge are true, and that he believes them to be true which are therein stated on information and belief.

N. A. COWDREY.

Subscribed and sworn to before me this 27th day of January, 1876.
[SEAL.] R. E. STILLWELL,
U. S. Commissioner.

Filed January 28, 1876.
Here follows:

Replication to answer of def't Cowdrey.

In the supreme court of the District of Columbia.

J. V. W. VANDENBURGH & CO. *vs.* M. MANDEL, N. A. COWDREY ET AL. } No. 3969. Eq. doc. 14.

The complainants join issue with the defendant N. A. Cowdrey upon his answer, and will hear the cause as to the said defendant upon the bills of complaint, answer, and proofs.

JAMES G. PAYNE,
Sol'r for Complainants.

27 In the supreme court of the District of Columbia.

* * * * * * *

Testimony for complainants in causes Nos. 3969 and 3970.

Here follow:

Notices for taking testimony before J. J. Johnson, examiner.

Proceedings before Examiner Johnson.

OCTO. 16, 1877.

Met pursuant to notice; present, counsel on both sides.
It is agreed by and between James G. Payne, for complainant, and

Joseph H. Bradley, for defendants, that the depositions taken may be used in both cases, and read at the hearing.

J. V. W. VANDENBURGH, being duly sworn, says:

I reside in this city. I was a member of the firm of J. V. W. Vandenburgh & Co. in January, 1874. The firm consisted of Lewis L. Filbert, Henry L. Cranford and myself. The firm held the certificates held in both bills of complaint. Those certificates were received from the board of public works, for work done by J. V. W. Vandenburgh & Co.

The certificates enumerated in chancery bill No. 3969 were hypothecated with Mr. Mandel by myself for a loan of $5,000 for six months. I was treasurer of the firm, and made the loan for the firm. The numbers of these certificates are 360, 390, 4351, marked letter A of the series.

These certificates were endorsed, at the time they were hypothecated, "J. V. W. Vandenburgh & Co."

(The testimony as to the endorsement of the certificates objected to, as the certificates are the best evidence.)

28 Witness resuming, says:

There was a note of the firm given as evidences of debt for this $5,000 loan, dated Jan'y 27, 1874, for six months from date. I have never seen that note since. I do not know where it is. I am certain the numbers of the certificates were mentioned in the notes; they were mentioned in the notes as being collateral security.

I went to the office of Mandel when the note matured, and could not find him; I made every effort to find him, but could not. I had the money deposited to meet the note and redeem the certificate, and so notify him by letter, and left it at his office. I was prepared to meet the note at its maturity, and had the money. I made efforts to find Mandel, but without success. These certificates remained in my personal possession from the time we got them from the board of public works until we parted with them to Mandel.

The form of the certificates set out in the 12th paragraph of the bill is substantially the form of the certificates, except the amounts.

Long before the note became due, I was satisfied the certificates were out of Mandel's hands, and I notified the board of public works by letter. I went to Col. Magruder and gave him the numbers of the certificates. Mr. Mandel had left town, which aroused my suspicions. There was a good deal of excitement among the contractors at the time, who had dealings with him. I took this course, knowing the certificates would have to come back there.

My firm has been ready and are ready at any time to pay up this note since its maturity.

In relation to the certificate mentioned in bill 3970, it is No. 4441. The firm on the 17th of Feb., 1874, was the owner of this certificate, and received it from the board of public works for work done on Columbia street. The firm had it continuously in their possession from the time they received it until that date. That certificate was hypothecated with Rudolph Blumenberg, and was security for a loan of $3,160, for which I gave the firm note, due in six months from that date. This

29 certificate was mentioned in the body of the note as being collateral security for the note. At the maturity of the note, I put the money in my pocket and went to Blumenberg's office, and could not find him. I left a note at Blumenberg's office, informing him I had the money and was ready to pay the note and redeem the security. The interest was deducted when the loan was made.

This certificate was included in the letter I wrote to the board of pub-

lic works. The form of this certificate set out in paragraph 12 of this bill is correct. The firm has been ready since its maturity to pay this note and redeem the certificate. At the time of the hypothecation of this certificate it was simply endorsed across its back, "J. V. W. Vanderburg & Co." I have never seen Mandel or Blumenberg since the maturity of these notes.

Cross-examined by Mr. BRADLEY:

The firm has dissolved. I think it dissolved some time in the summer of 1875. At the dissolution we appointed two trustees to settle up our affairs made in writing. The trustees are L. M. Hoffman and Robert M. Drinkard. They both reside here in Washington. They have that agreement. I have no copy of it; there is a copy at the office of Cranford and Hoffman. I think I can get a copy of that agreement and furnish it to the examiner.

Q. Do you recollect what provision was made in that agreement for the payment of the notes you have mentioned?

A. I don't wish to be understood as saying there was any special provision in this agreement for the payment of the notes. It was generally understood and agreed that if these notes and securities were presented to either member of the firm, that they would be redeemed either by ourselves or the trustees. No matter who redeemed them, they would go in the hands of the trustees.

There were no funds put in the hands of the trustees with which to redeem those notes. We kept our account, I think, in July, 1874, at the Citizens' Bank. Until we appointed trustees, I don't think any member of the firm drew checks except myself. Mr. Cranford may have done so, but I don't recollect it. I do not remember when the bank account was settled. I presume at the time of appointing trustees our bank account was settled up. Hoffman and Drinkard drew checks after that. I don't remember how the bank account stood then. The bank books were left in the possession of the trustees. I have not had anything to do with the cash transactions of that concern since its dissolution.

I did not carry any money with me when I went to redeem the $5,000 loan. We had made an arrangement with the Citizens' Bank for money to pay this note, if presented, with its securities. I did not make a deposit in July, 1874, for the purpose of taking up this note. I had the money in my pocket to redeem the $3,160 note, when I went to his office. I did not deposit that money in bank; that was my own money, personally. I went to each on the first day the notes were due. I can't say for what purpose I endorsed the certificates; it was a matter of form; in case a man fails to meet his obligations, it would save him from going through the equity court. It was not intended to enable him to sell the certificates, and I told him so at the time. If it was, I should not have done it. I did not consider that they could be sold without a transfer by power of attorney, and told him so. I had not large transactions with other people outside the Freedmen's Bank. I had operations with other banks, borrowing money on certificates.

Q. Do you mean to say that when you borrowed money and endorsed and delivered such certificates as collateral security that it was not understood between you and the lender that if you failed to pay the note at maturity the lender might sell the certificates and pay himself out of such sale, and that the endorsement was put on to enable you to do so?

(Objected to as improper in form and as calling for the understanding of other parties.)

A. No, sir; there was no such arrangement talked of or contemplated by me as a sale of those securities; nor was the subject of sale
31 ever mentioned by him. I told him when I endorsed it, that in my judgment the endorsement was good for nothing without a transfer or power of attorney.

I have no recollection of ever having sold a certificate outright. I have made loans with banks, and with some brokers here, and when the loans fell due we have either collected the money or transferred them into bonds. Then I have consented to the sale of the bonds in a great many cases. I most invariably went with the parties, and made the transfer. I went with them to the treasurer, James A. Magruder, and made the transfer. He was satisfied if I brought them. I have often made them payable to the order of the person I was dealing with. I am not prepared to say that the firm ever sold any certificates.

Q. Up to the time of the dissolution of your firm did you keep a balance in bank at all times to pay both or either of these two notes?

A. No, sir; we did not.

Q. Was your firm solvent or not at its dissolution, and did it pay its debts?

A. It was.

The trustees have not settled their account with the firm. All the debts of the firm have been paid except these notes, and when they are presented they will be taken care of.

Mandel's place of business was on Penn. avenue, between 12th and 13th streets. Blumenberg's was in the same room.

Q. Did you take any receipt from Blumenberg or Mandel when you made the negotiations with him?

A. Yes, sir; I now offer them.

The same are herewith marked and filed Exhibits J. V. W. V. 1, and J. V. W. V. 2.

I wish here to make a correction where I said the account was kept at the Citizens' National Bank. It should be the 2nd National Bank.

J. V. W. VANDENBURGH.

Sworn and subscribed to before me this 31st day of October, 1877.

J. J. JOHNSON,
Examiner.

32 Mr. Payne here files exhibits marked J. V. W. 3, J. V. W. 4, J. V. W. 5.

J. J. JOHNSON,
Examiner.

Here follows certificate of examiner.

Exhibits.

J. V. W. V. 1.

Six months after date I deliver to J. V. W. Vandenburgh & Co. $8,451.88 certificate, Board of P. Works, for $3,180.00, paid to me in cash. No. of certificate. 4441.

Washington, February 17, 1874.

RUDOLPH BLUMENBURG,
1213 *Pennsylvania Avenue.*

J. V. W. V. 2.

Six months from date I will deliver to J. V. W. Vandenburgh & Co. $12,491.60 (twelve thousand four hundred and ninety-one 60-100 dollars,) in auditor's certificates of the District of Columbia, against the payment of $5,000 (five thousand dollars) in U. S. currency paid into my hands.

Washington, January 27th, 1874.

M. MANDEL.

No. 390.	4,956.80
" 360.	1,534.80
" 4,351.	6,000.
	$12,491.60

J. V. W. V. 3.

WASHINGTON, D. C., *Apr. 16th*, 1875.

We hereby mutually agree to appoint L. M. Hoffman, Robert M. Drinkard, and John H. Riggles to adjust and settle all our bills
33 and accounts, and we hereby appoint L. M. Hoffman and R. M. Drinkard to receive all moneys, bonds, and securities, and authorize them jointly to pay all the just debts of this firm, and from time to time sell such securities as may be necessary to do so, and the remainder that may be left, to be paid over to each of us pro rata, with the exception of three thousand dollars in 3.65 bonds, which are to be retained for repairs of pavements until the term of our contracts expires.

(S'd) J. V. W. VANDENBURGH,
H. L. CRANFORD,
L. S. FILBERT,
Composing the firm of J. V. W. Vandenburgh & Co.

J. V. W. V. 4.

WASHINGTON, D. C.,
August 21st, 1874.

Messrs. TAYLOR and BROADHEAD,
Board of Audit, District of Columbia:

SIRS: On January 27th and Feb'y 17th, 1874, we gave our notes of hand to Rudolph Blumenburg and M. Mandl, due six months from date. We also deposited with them as collateral securities auditor's certificates of District of Columbia as follows:

No. 360 S st., betw. 14th and 15th streets N. W., Jan'y 21, '74.		$1,534 80
" 390 14 " " New York ave. and H, " " "		4,956 80
" 4351 (letter A) 13 street circle, Dec. 6, '73.....		6,000 00
" 4441 Columbia st., " "		8,451 88
		$20,943 48

34 The last of these notes fell due yesterday, and we have exercised due diligence to find our notes and securities, and are prepared to pay our notes and redeem our securities. We have the amount of our notes and interest deposited in the Second National Bank, Washington, D. C., to pay the said notes when they may be presented with our securities. We are fearful that our securities have been improperly disposed of, and therefore call upon you to delay the transfer or finding of the above-mentioned certificates, as we have never disposed of our

property in them, and are prepared and anxious to redeem them at any time.

Very resp'y, your ob't ser't,

J. V. W. VANDENBURGH & CO.

J. V. W. 5.

WASHINGTON, D. C.,
March 10th, 1874.

Hon. JAMES A. MAGRUDER,
Treasurer B. P. W., D. C.:

We have the honor to state that on January 27th and Feb'y 17th we deposited with one "M. Mandle and one Rodolph Blumburg," as collateral for certain loans, sundry certificates issued by the auditor of the board of public works, as follows, viz:

No. 360 I street, bet. 13th & 14th st. N. W.,	dated Jan'y 21, '74.		$1,534 80
" 390 14th st., N. Y. ave. and H street,	" " "		$4,956 80
" 4351 (letter A) 13 st. circle,	" Dec. 6th, 1873		$6,000 00
" 4441 Columbia street,	" " " "		$8,451 88
Total			$20,943 48

35 We hereby protest against the payment of any money on the aforesaid certificates to any person or persons.

Very respectfully, your ob't sev'ts,

J. V. W. VANDENBURGH & CO.

True copy of original.

J. V. W. VANDENBURGH.

Decree pro confesso against certain of the defendants.

In the supreme court of the District of Columbia.

J. V. W. VANDENBURGH ET AL.
vs.
M. MANDEL, N. A. COWDREY ET AL. } 3969. Eq. doc. 14.

This cause coming on to be heard upon the original and amended bills of complaint, the decrees pro confesso against the defendants Horton, Johnston and Brown, the answer of the defendant N. A. Cowdrey, the replication thereto, and the depositions taken in support of the bills of complaint, and the cause being argued by counsel for both sides, and duly considered by the court, it is, this 2nd day of April, 1878, ordered, adjudged, and decreed that the decree pro confesso against the defendants Horton, Johnson and Brown be, and the same hereby is, made final.

And as to the defendant N. A. Cowdrey, the plaintiffs are entitled to recover, and it is hereby ordered, adjudged and decreed that they do recover from him, the value of bonds of the District of Columbia, commonly known as three sixty-five bonds, of the par value of ten thousand nine hundred and fifty-six dollars and eighty cents ($10,956.80),
36 together with the interest paid and collected upon the said bonds, less five thousand dollars ($5,000), with interest thereon from the 27th day of July, 1874, to the date of this decree, which several amounts being ascertained by agreement of counsel, there appears to

be due from the said defendant N. A. Cowdrey, to the complainants, the sum of three thousand eight hundred and twenty-four 44-100 dollars ($3,824.44), and it is therefore ordered, adjudged, and decreed that the complainants do recover from the said defendant the said sum of three thousand eight hundred and twenty four 44-100 dollars, together with costs, and that they have execution as at law therefor.

By the court.

MAC ARTHUR, *Justice.*

Appeal.

In the supreme court of the District of Columbia, holding an equity term.

J. V. W. VANDENBURGH ET AL. *vs.* MANDEL, COWDREY ET AL. } No. 3969. Eq. doc.

In this cause the defendant N. A. Cowdrey, in open court, this 9th day of April, A. D. 1878, prays an appeal from the decree entered therein against him to this court in general term, and files herewith his undertaking with Mr. Hartley and M. W. Galt as his sureties therein, as prescribed by the rule of this court.

JOSEPH H. BRADLEY,
Sol'r for N. A. Cowdrey.

37 And thereupon it is by the court ordered this 9th day of April, A. D. 1878, that the said appeal be, and the same is hereby, allowed, and the said undertaking is approved by the court.

By the court.

MAC ARTHUR,
Justice.

Proof of publication.—Filed June 14, 1878.

J. V. W. VANDENBURGH, H. L. CRAWFORD, L. F. Filbert, trading as J. V. W. Vandenburgh & Co., *v.* M. MANDEL, THE DISTRICT OF COLUMBIA ET AL. } In equity. No. 3969.

This cause came on to be heard upon appeal of N. A. Caudrey from the decree of the special term in equity of April 2, 1878, whereby it was ordered, adjudged & decreed that the complainants do recover from the said defendant the sum of $3,824.44, together with costs, and have execution as at law therefor; which said decree was submitted to the court without argument on either side; whereupon, upon consideration thereof, it is ordered, adjudged, and decreed by the court here, this 2d day of October, 1879, that the said decree of the said special term be, and the same is hereby, affirmed, with costs.

And from this decree the said defendant, N. A. Caudrey, by his solicitor, here now in open court, prays an appeal to the Supreme Court of the United States, and the same is allowed.

38 In the supreme court of the District of Columbia, the 13th day of October, 1879.

J. V. W. VANDENBURG AND OTHERS, TRADING as J. V. W. Vandenburg and Company, *vs.* M. MANDEL, THE DISTRICT OF COLUMBIA, N. A. Cowdrey and others. } In equity. No. 3969. Appeal.

Know all men by these presents that we, N. A. Cowdrey and Marcellus Hartley, both of the city of New York, are bound unto the abovenamed J. V. W. Vandenburg, H. L Crawford, and L. S. Filbert, trading as J. V. W. Vandenburg & Co., in the sum of seven thousand dollars, to be paid to the said J. V. W. Vandenburg and Company, and the survivors and survivor of them, their and his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 13th day of October, 1879.

Whereas the above-named N. A. Cowdrey has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the abovenamed N. A. Cowdrey shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

N. A. COWDREY. [L. S.]
MARCELLUS HARTLEY. [SEAL.]

Sealed and delivered in presence of—
H. C. BANKS.
J. J. WARD.

Approved by order of the court.

D. K. CARTTER,
Ch'f Justice.

39 STATE OF NEW YORK,
City & County of New York, ss:

Marcellus Hartley, being duly sworn, deposes and says that he is the individual who signed the within bond; that he resides in the city of New York, at No. 232 Madison avenue, and is a freeholder in said city; that he is worth more than the sum of fifty thousand dollars over and above debts and property exempt by law from execution.

MARCELLUS HARTLEY.

Signed and sworn to before me on the 16th day of October, 1879.
[SEAL NOTARY PUBLIC.] HENRY C. BANKS,
Notary Public, 3 John street, New York City.

40 *Authentication of record.—Clerk's certificate.*

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

R. J. Meigs, clerk of the said court, do hereby certify that the writ-

ings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 15 day of November, 1879.

[SEAL.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

(Indorsement on cover:) No. 1076. N. A. Cowdrey, appellant, vs. J. V. W. Vandenburgh, H. L. Cranford, & L. S. Filbert, as J. V. W. Vandenburgh & Co. District of Columbia sup. court. Filed 17 November, 1879.

Supreme Court of the United States.

OCTOBER TERM, 1879.

N. A. COWDRY, *Appellant*,
vs.
J. B. VANDENBERGH and others, *Appellees*. } No. 1075.

N. A. COWDRY, *Appellant*,
vs.
J. B. VANDENBERGH et al., *Appellees*. } No. 1076.

PHILADELPHIA BAR ASSOCIATION

JOS. H. BRADLEY,
Solicitor for N. A. Cowdry.

R. O. POLKINHORN, Printer, 632 and 634 D Street, N. W.

Supreme Court of the United States.

October Term, 1879.

N. A. COWDRY, *Appellant*,
vs.
J. B. VANDENBERGH and others, *Appellees*. } No. 1075.

N. A. COWDRY, *Appellant*,
vs.
J. B. VANDENBERGH et al., *Appellees*. } No. 1076.

Brief of Appellant in the foregoing causes.

These appeals are from decrees of the Supreme Court of the District of Columbia.

The causes originate in contracts made by Vandenburgh & Co. with the Board of Public Works of the District of Columbia for grading, paving, and improving certain streets, &c., in the City of Washington.

The immediate causes of action are certificates of the Auditor of the Board of Public Works of said District granted to the appellees, showing the amount due to them under certain of their contracts, which certificates were endorsed by the appellees; they subsequently came to the hands of the defendant a *bona fide* purchaser for value, in open market, and were paid by the District of Columbia to the appellant. The object of the bill is to recover the

amount so received by him, less the advances made by the parties to whom they were endorsed and delivered by the appellees.

It is a matter of history, fully shown by the proceedings in, and the legislation of, Congress, that when the District of Columbia was created, in 1871, a corporation with a local legislature, very large powers over the avenues, streets, and all thoroughfares and sewers, were given to a quasi corporation created by the act, called The Board of Public Works. That board set to work to grade, pave, and improve a large number of the streets and avenues, and to create a system of sewerage in the City of Washington, and made contracts for those purposes, involving a vast outlay of money. The ordinary resources of the city were wholly insufficient to meet the cost involved in these works, and the corporation imposed special taxes on the private property in front of which these improvements were made. But it was impossible, by this means, to get in money sufficient to meet one-half of these contracts as the work progressed and was completed. As a mode of relief, they empowered the Auditor of the Board of Public Works to ascertain the value of the work done, and to issue certificates therefor to the contractors, in the form set out in the pleadings.

It is doubtful whether the full amount of those certificates has been ascertained to this day, but it is certain they amounted to several millions of dollars.

It is also matter of history that the certificates of the Auditor of the Board of Public Works, when endorsed by the contractors to whom they were issued, went upon the market, and were sold and delivered as a marketable commodity, and the holder was recognized by the Board of Audit, afterwards created by act of Congress, as the owner; and upon the certificate of that board being countersigned

by the Comptroller of the District, the amount so certified was paid by the Treasurer of the District. And this is succinctly and sufficiently set out in the bill itself.

Cowdrey, in his answers, which are responsive to the charges in the bills and to the discovery sought, says: "That said Hartley and this defendant were on a casual visit to the City of Washington, District of Columbia; that said certificates of the Board of Public Works and similar ones were offered for sale to them (the said Hartley and this defendant) by brokers and dealers, and they were solicited to purchase the same. They made full inquiries, and learned that said certificates, representing audited debts against the District of Columbia, which, when endorsed by the payees therein named, passed from hand to hand in the market as merchantable and transferrable property, and that the value of said certificates was duly quoted at the Stock Exchange of the City of Washington, and that the holder of them, on presentation of said certificates at the proper department of the government of the District of Columbia or Board of Public Works, for settlement, was recognized as the owner, and received from the District of Columbia the amount due thereon. That the amount of similar certificates issued by the said Board of Public Works was large, defendant thinks, about $7,000,000; and that there was a large traffic or trade in said certificates, the same passing from hand to hand by delivery, when endorsed by the payee; that the trade and traffic was not confined to Washington, but was carried on in other cities, viz: Baltimore, Richmond, Philadelphia, Newark, Jersey City, and the City of New York, and other places, to the defendant unknown; that said facts had been known and said trade in said certificates had been carried on for a long time previous to the purchase of the same being made by this defendant, the defendant thinks, for years; all of which

was well known and participated in by plaintiffs in this cause and by many brokers, bankers, merchants, and others having money to invest or to use temporarily; that under these circumstances, this defendant and said Hartley purchased said certificates, Nos. 390 and 4,351, from a well known and responsible business man in the City of Washington, viz: Mr. L. J. Crounse, * * * : that at the time they purchased many thousand dollars of similar certificates in addition to said Nos. 390 and 4,351."

In his answer he further says, at p. 13, he "purchased said certificates * * of said Crounse, and paid him the full market value therefor, and received said certificates from him, said Crounse, and thereupon caused to be written or printed on the back of each of said certificate, over the endorsement of the plaintiff, the payees therein named, as follows: "For value received the within debt is assigned to N. A. Cowdrey, who is authorized to collect the same to his own use."

On p. 11, answer to interrogatory (*a*), he says "that (these) certificates this defendant presented, on or about the 16th July, 1874, to said Board of Audit, properly assigned and transferred by the plaintiffs to this defendant, for their audit; that said Board audited said certificates of debt, and cancelled the same."

To the interrogatory (*e*). "The Board of Audit has audited them, and gave the certificate of audit."

Page 12, interrogatory (*h*). "The certificates of the Board of Audit were presented to the Sinking Fund Commissioners, and 3.65 bonds of the District of Columbia given therefor. * * I think it was in December, 1874."

Page 14, at top. He has not seen the certificates since 16th July, 1874. In his answer, filed 28th January, '76, at p. 10, he says "the first knowledge he had of this suit was conveyed to him by Messrs. Bradley & Duvall, at the city of Washington, 26th January, 1876.''

This, in substance, is the discovery of facts within his own knowledge, "to show why the plaintiffs should not have the relief prayed for."

This is the adjudicatioe of the title, and in these cases the Board of Audit gave the certificates to Cowdrey, and he received the bonds for them.

As has been stated, Cowdrey deposited his Public Works certificates with the Board of Audit on the 16th July, 1874; this bill was filed 20th October, 1874, and that was the first movement of the complainants' setting up any claim to the original certificotes, although the bill also sets up that they knew as early as the 30th July, '74, that Mandel had absconded, and they had sought for him in vain. (p. 2, par. 10.)

During this period of three months, very nearly, the Board of Audit was acting on such certificates with full knowledge of complainants (see 17, 18 and 19 par., p. 4), and complainants allowed the certificate of the Board of Audit to be made, adjudicating the said claims to Cowdrey, and Cowdrey to receive the bonds on them without serving him with notice of their claim.

By an act of Congress, 18 vol. Stat., pp. 118, 119, a Board of Audit, consisting of the First and Second Comptrollers of the U. S. Treasury, was created to audit, among other things, the certificates thus issued by the Auditor of the Board of Public Works, and to issue their certificate of the indebtedness found by the Board of Audit, which was to be countersigned by the Comptroller of the District, and thereupon, on presentation thereof, the amount thus certified was paid by the Treasurer of the District of Columbia.

It will be seen, by reference to the bill, it is alleged (p. 2, Rec.), "he, the said Mandel, instead of retaining the said certificates so held by him and delivered to the plaintiffs on

payment of the amount so advanced, or loaned, as aforesaid, secretly, and without the consent or knowledge of the plaintiffs, or either of them, disposed of or *delivered the said certificates to some person or persons to the plaintiffs unknown, who were conniving and co-operating with him, the said Mandel for the wrongful and fraudulent purpose aforesaid, and by whom, or by some other person or persons, to the plaintiffs unknown, the said certificates are now wrongfully held or claimed, and being used or attempted to be used.*

And see, also, the whole of the 18th par., (p, 4, Rec.,) and the 21st par., "to the end, therefore, that the said Mandel *and his confederates*, when discovered, as well as the other defendants, or any or either of them, *if they can, may show why the plaintiffs should not have the relief herein sought*, and prayed."

Rec., p. 7. Supplemental bill to make N. A. Cowdrey party to original bill, (p. 8), he, "and in *fraud* of the lawful rights of complainants, is claiming and seeking to possess himself of the proceeds of the said certificates," &c., "prays that he may be made a party defendant to the said original bill of complaint, and be required to answer the same as fully as if the same were here again fully at large set forth."

Almost all bills are bills of discovery. He is here charged with fraud and confederacy, and called on *to show why the plaintiffs should not have the relief prayed.* His answer is responsive to the charges of confederacy and fraud, and shows why the relief prayed should not be granted. It is, therefore, responsive, and the facts set up in it to show cause are evidence.

They filed their amended bill, making Cowdrey a party, and issued subpœna 23d November, '74, which was not returned till 5th March, '75, (Rec., p. 8 bottom,) and they took their decree, *pro confesso*, against him, 21st Dec., 1875, a year after he had received the bonds, and the first

notice he had of their claim was on 26th January, 1876. (Rec., p. 10.)

There are two letters on pp. 18, 19, of the record, one purporting to have been written on the 21 August, 1874, addressed to Messrs. Taylor and Brodhead, Board of Audit; and the other dated 10 March, 1874, addressed to Jas. A. Magruder, Treasurer B. P. W., D. C., and both signed by J. V. W. Vandenburg & Co.; but no evidence was taken to show that such letters were, in fact, written or sent. They are, therefore, not in the cases.

The pleadings and evidence fully sustain this statement of the facts, for the bills are identical in the two cases. The 15th paragraph of the bill sets out in detail the duties of the Board of Audit touching these certificates of the Board of Public Works, and among other things that they were required to make a tabular and detailed statement thereof, as the *same may be presented to them, and of the persons owning the same*, and the amount found to be due thereon, and to issue to the owner, or *just and legal claimant*, a certificate, signed by each of the members of the said Board, stating the amount found due to such owner or claimant.

Paragraph 17 further presents the course of business as to the certificates of both classes, viz: those of the Board of Public Works and those of the Board of Audit; and paragraph 19 charges that complainants have reason to believe that their certificates named in the bill, have been, or are about to be, presented to the Board of Audit, and it is the purpose and design of the said Board of Audit to examine and audit said certificates in *favor of the person or persons who have presented, or who may present the same* to the said Board without reference or regard to the true ownership thereof, or consideration of plaintiffs' right and claim thereto." This bill was sworn to Oct. 19, 1874.

Cowdrey, in his answers, says he has not seen the certificates since 16th July, 1874, when he presented them to the Board of Audit.

Here the allegations and charges are confederation and fraud; and the searching inquiry is to show cause, if they can, why the prayer of the bill should not be granted.

The allegations and charges, and the discovery sought, are synonymous, although not expressed in the identical terms, with the case of *Baldwin* vs. *Ely:* and there the answer was decided to be evidence under a general replication and upon proof taken.

9 How., 601.

If there shall be suggested a doubt as to whether Cowdrey's answer is admissible as evidence, so far as it has been quoted, it will be put at rest by reference to *Baldwin* vs. *Ely*, 9 How., 600. There the bill called upon the defendant to discover the right and title which Ely possessed, or under which he claimed, and the prayer is that said Ely may be required, in this court, to prove and show how the said certificates were procured from your orator, and for what consideration, and when and where.

We therefore assume, on the pleadings and evidence in these causes—

1. The Board of Public Works had lawful authority to issue, through its auditor, certificates of indebtedness for sums of money due under contracts with the Board of Public Works.

2. That the Board of Audit had power to revise the certificates thus given, and to issue their certificates in lieu thereof.

3. That the Comptroller of the District of Columbia had power to countersign the certificates of the Board of Audit, and thereupon the Treasurer of the District of Columbia

was bound to pay the amount so certified to be due to the person mentioned in the certificate of the Board of Audit as entitled thereto.

4. That when the Auditor of the Board of Public Works issued a certificate to a contractor, and the contractor endorsed and delivered the same to a third party, it became a marketable commodity in the usual course of trade.

5. That when a certificate was so endorsed and presented to the Board of Audit, that board treated the person so presenting it, and claiming it to be his own, as the owner thereof, and issued their certificate to him.

6. That these facts were well known in the community of the District of Columbia, and were acted on by the citizens thereof, and that they were known and acted upon in like manner, and the certificates bought and sold by dealers in the large cities of the United States.

7. That the said certificates, so endorsed, passed from hand to hand without further endorsement.

8. That the defendant purchased the certificates in question in the regular course of trade, *bona fide*, without notice of any prior equities, except as to the state of accounts between the District and the contractors, and that he paid the full market value therefor.

The bills set up that the certificates were only hypothecated by the complainants, who borrowed money on them, and they were endorsed and delivered by them to parties named as defendants in the said bills. These parties never appeared or answered. They put them in circulation in bad faith before the loans became due, and complainants now offer to redeem and pay or deduct from the amount realized by the defendant the sums so advanced, with interest, and the court so decreed.

Assignment of Error.

The defendant will maintain that the court erred in that decree which, in substance, put the defendant in the shoes of the original lender of the money.

Points.

I. We will endeavor to satisfy the court that in equity the endorsement and delivery of those certificates was a valid assignment of all the interest of the assignor, and that interest was subject only to the state of accounts existing between the party to whom the certificate was given and the District of Columbia.

II. That when there are two innocent parties, and one of them must suffer loss, he whose negligence or default caused the loss must bear it.

1. These certificates were *choses in action.* They were assignable at law and in equity. These are familiar principles. Both at law and in equity the assignee took, subject to the state of accounts between the original parties, and all other equities of which he had notice. The effort here is to make him subject to equities between the assignor and third parties, of which he had no notice.

In *Baldwin* vs. *Ely*, 9 How'd, 599, 600, Ch. J. Taney delivering the opinion of the court in a case where the complainant, being the holder and owner of certain Mexican certificates, as they were called, which, he alleged, had been lost or stolen after he had endorsed them, and had come to the hands of the defendant, and which were, under the law, made payable to executors, administrators and assigns, says, arguendo:

"The certificates in question were endorsed in blank by the appellant, and that endorsement would be useless and unnecessary, unless made for the purpose of transferring the

property to an assignee, and authorizing any person, entitled to it in that character, to write over his name a formal and regular assignment, if that should become necessary, or he should deem it his interest to do so. The holders of certificates of this description, thus endorsed in blank, have always been recognized at the Treasury Department as assignees, without any formal assignment; and the money due on the certificates paid to them, except, only, when doubts were entertained of the genuineness of the endorsement, or notice given that the title of the holders was disputed. Neither the law nor the usages of the Department requires that the endorsement or assignment should be attested by a witness."

That was precisely what was done in Cowdrey's cases. Does it make any difference that in one case the paper was assignable at common law, and in the other under a statute? Certainly not, except that, at common law, he could not sue in his own name, and under that statute he might.

In the case of *Talty* vs. *Freedman S. & T, Co.*, 93 U. S., 326, which was an action of replevin, to recover one of these certificates, which had been delivered by payee, with his endorsement, to his broker to deposit as collateral for a sum of money, and the broker, claiming the right under some parole authority from the plaintiff, sold it to the bank. Mr. Justice SWAYNE says:

"There is another question arising on the record, and that is whether the defendant in error, being a *bona fide* purchaser, did not, under the circumstances, acquire the ownership of the claim."

And he cites numerous authorities in support of the affirmative of that question, but no decision was made by the court of that question as the case went off on another ground.

In *Chesley* vs. *Taylor*, 3 Gill, 251, the court permitted the holder of a single bill, a sealed note, a chose in action, endorsed by the payee, to write over the endorsement an

assignment to himself, that he might maintain an action on it, brought in his own name under the act of 1829, chap. 51. And see, also, *McNulty* vs. *Cooper*, 3 G. & J., 218. And in *Cox* vs. *Sprigg & Wife*, 6 Mary'd, 274, 288, the Court of Appeals decided that the right to bring the action in his own name is the only change made in the common law by that statute.

But we are in Equity. There it cannot be doubted that the assignee of the chose in action may enforce specific performance of an agreement or covenant, and receive the money to his own use. *Bentley* vs. *McKim*, 7 H. & J., 501.

Here we have received the money without notice.

The question then arises, whether anything more is necessary, in equity, ito complete an assignment of a chose in action than for the owner to endorse and deliver it, especially after the money has been paid, and the legal title thus secured.

As between the parties to the assignment, they would, of course, be bound by the intent with which such endorsement and delivery were made. But how could that affect a subsequent *bona fide* purchaser for value, without notice?

The District of Columbia, among others, was made a party in these suits. If the endorsements on the certificates were of no value, and conveyed no rights, and no authority to the holder to receive the money, the complainants have received no injury. The District of Columbia is still responsible to them, the payment having been made without authority. There is no privity between the complainants and this defendant, and if the latter is responsible to anyone, at law or in equity, it is to the District. The complainants have carried their case to a final decree against this defendant. The case is closed. There is no case in the court below, and it is the same, and has the same effect, as though

they had dismissed their bill as to them. We hold this to be a clear admission that the money was *rightfully* paid to Cowdrey. If it was rightfully paid, how can they hold him to account for it to them, on the theory of this bill? They, the complainants, are thus estopped from seeking to make Cowdrey a forced trustee for them.

It seems to be admitted, by the bill, that an assignment might have been made which would have bound them. They claim that this endorsement was not such an assignment. Would a power of attorney have been more effectual, whether endorsed upon or annexed to the certificate? The case of *McNeil* vs. *Tenth Nat. Bank of New York*, 46 New York, 325, seems to be conclusive of that question, while the cases referred to by Mr. Justice SWAYNE, cited above, give that case full support. The endorsement was vain and idle, unless put on for some purpose—it was either to deceive or it gave power. If the former, a court of equity will not listen to any attempt to impeach it. If the latter, a court of equity will enforce it. We say it gave to the persons to whom it was delivered, thus endorsed, power "to write over their names a formal and regular assignment of it, if that should become necessary." This was done in the most formal manner, and the bonds paid to defendant. See 3, G. & J., 218; 3 Gill, 250; 9 How., 600.

SECOND.

But if we are mistaken in this, then we say the defendant was an innocent *bona fide* purchaser for full value, and was led into those purchases by the *indicia* of title exhibited by the endorsement of the complainants, viz, the fact that they had a marketable value and passed by delivery on sale; and they were in the possession of third parties, the papers having this *indicia* of title; and this by reason of complainants' culpable negligence: if there was any fraud

on the part of the person to whom they were first endorsed and delivered, the purchaser cannot be affected thereby.

1. We think it is established beyond reasonable doubt that these certificates, thus endorsed, were marketable commodities, and passed by delivery in open market.

We further insist that this was known to the complainants, and that they knew when they were endorsed and parted with by them that they would be recognized by the accounting officers as the property of the persons presenting them for adjustment, settlement, and payment.

They, therefore, knew that they were giving credit to them if they should be parted with by those to whom they had been hypothecated with their endorsement, which was the *indicia* of title.

It was, therefore, their duty to have accompanied their endorsement with some words of warning or restriction, which would have been notice to everybody to whom they were presented—such as "collateral," "hypothecated," or some words to show that there was some restraint on the power of sale which the payee's indorsement imported, and upon the absolute disposal thereof.

They could not transfer property with this *indicia* of title and yet hold a secret trust upon it, like a "pocket deed." We hold this principal to be too clearly fixed at this day to admit of discussion now. On this point, and also in support of our first point, we refer to the case of *Taylor* vs. *Gett*, 10 Barr, 431. The case is sufficiently stated in the opinion of the court: "We think, too, the court was wrong in the answers to the several points upon which instruction was prayed. *These answers proposed* to visit the Taylors [who were the purchasers of a bill single, a sealed note] with the supposed fraud committed by Pelouse against Dan'l Gett without any notice of it traced to the former."

[Gett was the payee in the chose in action, and had assigned it to Pelouse, and Pelouse had, in violation of his contract with Gett and without his authority, transferred it to the plaintiffs.] "They were based upon the rule established by *Wheeler* vs. *Hughes*, 1 D., 23, that the assignee of a bond, whether legal or equitable, takes it subject to all the equities which subsisted between the original parties, or between the obligor and an intermediate assignee (*Metzger* vs. *Metzger*, 1 R., 227) when he neglected to make the proper enquiry. The propriety of this rule has been questioned more than once, since it is in direct contradiction of the rule, both at law and in chancery, that a purchaser for a valuable consideration is not to be affected by a latent equity of which he had no notice, or the knowledge of which might not have been picked up in the road of his direct enquiry had he pursued it." * * But where there is no dispute on this head (that is, the amount due), where, as here, the *obligor* makes no defense and pays the money, there is no room for the operation of the principle deduced from the statute. The case is left to be governed by the ordinary rule of protection of a *bona fide* purchaser already stated. It would, indeed, be highly unjust if it were not so. Take the present case as an illustration. David Gett, the obligee, endorsed on the bill single, his transfer of it to Pelouse, purporting to be for value. Pelouse, in the course of trade, offers it to Taylor & Co., who learn from the *obligors* that they had no defense to make against it. Taylor & Co. accept an assignment of it from Pelouse, to whom they pay value. *Shall the man who first gave it currency be permitted to set up the fraud of the first assignee*, which *his* act enabled him to commit against an innocent holder without notice? In this respect it comes directly within the axiom that when one of two innocent parties must suffer, he who gave occasion of the loss shall bear it. (*McMullen* vs. *Wenner*, 16 S. & R., 21.) It will not do to say the *last assignee should have*

enquired of the obligee whether any difficulties existed before accepting the bill. This has never been held incumbent on the purchaser of a bond, simply because it is not to be supposed any information could be derived from one who appears to have parted with his whole interest in the thing."

To the same effect is *McNeil* vs. *The 10th National Bank, New York*, 46 New York, 325; in which the whole of these two points are discussed at great length. That case differs from these now in hand, in this particular only, that the owner of the securities, deposited as collateral, gave with them a *blank power of attorney* to sell and transfer them, which was filled up by the broker when he sold the securities and sold them in violation of his pledge.

We say the indorsement on the certificates in these cases and the delivery with the naked indorsement were equipollent with a blank power of attorney.

We refer to the whole opinion in this case, as showing the state of the law at the time of that adjudication.

In *Row* vs. *Dawson*, 1 Vez. Sen'r, 331; Lord HARDWICKE says, speaking of the subject-matter in controversy: "It is an agreement for valuable consideration beforehand, to lend money, on the faith of being satisfied, out of this fund, which makes it a very strong case. If this is not a bill of exchange, nor a proceeding on the personal credit of Swinburn or Gibson, it is a credit on this fund *and must amount to an assignment of so much of the debt; and though the law does not admit an assignment of a chose in action this court does, and any words will do, no particular words being necessary thereto.*" * * This draft, which amounts to an assignment, *is deposited with the officer Swinburn, and therefore it attached immediately upon it*, so that Swinburn could not have paid this money to Gibson, supposing he had not been bankrupt; *because he would have paid it with full notice of this assignment for valuable consideration.*"

This was while the case of *Ryall* vs. *Rowles* was under consideration by Lord HARDWICKE, assisted by the judges and argued by two counsel on each side, and reported in 1 Vez., Sen'r, 367, and 1 Atk., 165, under the name of *Ryall* vs. *Rolls*. In that case Lord HARDWICKE says: "But I will first consider the case of an assignment of a mere chose in action. The simplest case I know of is of a debt on bond, which is only assignable in equity, not at law. *The reason why assignable in equity is because the assignor can furnish the assignee with all the means to reduce it into possession, giving authority to sue in his name, and the bonds into his hands to prove his debts, when he does sue.* * * * Why will not the means of reducing into possession be considered in the same light as a conveyance of the thing itself? A bond debt is certainly a chattel."

Lord Chief Baron PARKER (one of the assisting judges) says, as to this matter: "On the third question it is objected for the defendant that this clause [a clause in the bankrupt act] extends not to things in action; * * but *goods and chattels include debts*, and things in action are considered as goods and chattels." (Slade case, 4 Coke, 95.) * * * "But it is said there can be only an equitable assignment of a chose in action, which is true; and yet in the case of bonds assigned (for bills of exchange or promissory notes are assignable at law) *they must be delivered, and such delivery of the bond or notice of the assignment will be equivalent* to the delivery of the goods." Chief Justice LEE says: "This act [the bankrupt act] supposing the conveyance to be on good consideration, and the party to be an honest creditor or mortgagee, but not to have any preference to other creditors, because he does not give notice to other creditors by *having that delivery to him to which he was entitled.* * * The enquiry on the second point is whether choses in action are not included in *goods and*

chattels. * * Choses in action will be included therein.'' (Fullwood's case, 4 to 65.)

And Lord Chief Baron PARKER: "That on the assignment of a bond debt the bond should be delivered and notice given to the debtor. And with respect to simple contract debts for which no securities are holden—such as book debt, for instance—notice of the assignment should be given to the debtor, in order to take away from the power and disposition over the thing assigned." 1 Vez., Sen'r, 367: 1 Atk., 177.

The mere delivery of a written evidence of debt, with intent to transfer the debt itself, is sufficient to constitute an assignment, whether it was conditional or not.

No notice was necessary in these cases, and the money has been paid to the assignee. The same principle has been settled in the cases of *Dearle* vs. *Hall*, 3 Russ., 1, and *Loveridge* vs. *Cooper*, 3 Russ., 30, which were questions of priority as between two assignees, the junior assignee having given the first notice. These cases were affirmed by the Lord Chancellor.

In the cases in hand the evidence is clear of good faith and diligence on the part of the defendant.

In the first case the Master of the Rolls, Sir THOS. PLUMMER, says: "What title have they shown to call on a court of justice to interpose on their behalf, in order to obviate the consequences of their own misconduct? All that has happened is owing to their own negligence, a negligence not accounted for, in forbearing to do what they ought to have done, what would have been attended with no difficulty, and what would have effectually prevented all the mischief which has followed. Is the plaintiff to be heard in a court of equity who asks its interposition in his behalf to indemnify him against the effects of his own negligence,

at the expense of another who has used all due diligence, and who, if he is to suffer loss, will suffer it by reason of the negligence of the person who seeks relief against him. The question is not, as in *Evans* vs *Bricknell*, whether a court is to deprive the plaintiffs of any right—whether to take from them, for instance, a legal estate or to impose any charge on them. It is simply whether they are entitled to any relief against their own negligence."

And in the same case he says:

"What opportunities for fraud would be afforded if a party having obtained an equitable conveyance conceals it from every body, and lies by for years while intermediate tranactions are taking place, could at any time come forward with his secret deed and say to a subsequent purchaser, who had advanced his money in ignorance of such claim 'my deed is prior to yours, and, therefore, whatever may have been my negligence or your diligence the property belongs to me.' Good sense, reason, authority, and equity are all on the other side."

The principles contended for by us are—

Whenever, the holder of a written chose in action puts his name on it and delivers it to a third party, without any restriction, or limitation on the power and dominion over it by the party to whom it is delivered, accompanying, or upon the paper itself, it imports an absolute sale and transfer, and if his assignee assigns and delivers it to a third party for value without notice, the original holder cannot set up equities between himself and his assignee, to defeat the right of such purchaser. See cases cited above.

And, Second. That if he shall sustain loss by his negligence or other failure to accompany his indorsement with some act which shall subject a purchaser to take notice or put him on inquiry as to the right of an assignee to transfer it, "good sense, reason, authority and equity" concur in saying that he, himself, must sustain that loss.

The same principles prevail in sales of real estate. It would be difficult to find a rule, governing a court of equity, affecting a course of dealing (except indeed the rule *caveat emptor*) which would not apply equally to personal and real estate.

In the case of *Bayley* vs. *Greenleaf*, 7 Wheat., 46, Ch. J. MARSHALL, delivering the opinion of the court as to the question of the vendor's lien on the sale of real estate, says: "But whether the lien of the vendor be established as a natural equity or from analogy to the principle that in a bargain and sale the bargainor stands seized in trust, unless the money is paid: *still it is a secret invisible trust known only to those to whom it may be communicated; in fact to the world the vendee appears to hold the estate divested of any trust whatever, and credit is given to him in the confidence that the property is his in equity, as well as at law. A vendor relying on his lien ought to reduce it to a mortgage so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien. It would seem inconsistent with the principles of equity and with the general spirit of our laws that such a lien should be set up in the court of chancery to the exclusion of creditors.*" A *multo-fortiori*, we say, to the exclusion of *bona fide* purchasers for full value, in open market without notice.

And so in the case of *Moore et al.* vs. *Holcombe et al.*, 3 Leigh, 597. In that case, Holcombe had sold land to Moore and received a part of the purchase money; but had no security for the residue. Moore sold the land to Franklin, took his bonds for the purchase-money, and assigned those bonds to Murrell and Meem, for value, and without notice of the vendor's lien claimed by Holcombe. They gave notice to Franklin of the assignment to them, and

filed their bill to restrain him from paying and Moore from collecting those bonds, and to have the unpaid portion of the original purchase-money due to Holcombe paid out of those bonds.

CARR, J. (602), says: "It was said in argument that these assignees took the bonds subject to all the equity of the obligor, * * but they were not taken *subject to the latent equity of a third person.*"

CABELL, J., p. 603: "The lien is in itself secret and invisible. *The vendor had it in his power to make it otherwise, by reserving a lien expressed in his deed to the vendee:* or by taking a lien from his vendee in some other form, so as to be notice to all the world. If he omit to do this, if he convey the land to the vendee in such a manner as to make him appear the complete owner, with full power to sell or charge it; justice forbids that he should use his secret lien to the injury of those who, in ignorance of it (an ignorance produced by his own omission) have acquired, for valuable consideration, either the legal title or an equitable incumbrance. * * * What is the principle of justice that exempts from the lien of the vendor a subsequent purchaser? *It is that he has made his contract and paid his money without notice.* His acquisition of the legal title does not add to the justice of this claim the weight of a feather. In justice, then, the equitable incumbrancer stands on the same ground with the purchaser of the legal title, for he also has made his contract and paid his money without notice of the secret lien of the vendor."

TUCKER, P. J., pp. 606, 607: "Try this case by these principles. Was anything due from Franklin to Moore (when he received notice of Hancock's claim) which equity demanded that he should pay over to Hancock instead of Moore? Nothing was due. His bonds, indeed had been due to Moore, but Moore had sold them, for value, to persons who knew nothing of the vendor's pretensions. From

the moment of that sale, Franklin ceased to owe Moore anything. He became the debtor of the other assignees, and he owed Moore nothing, he could be liable to Hancock for nothing, as had been already shown." (Hancock had attached Moore's interest.)

"It is true that assignees take every bond, subject to the *obligor's* equity against the obligee, but I have yet to learn that they take subject to an unknown equity of a stranger against the obligee."

Many cases of this kind might be produced to show that where there was a secret trust binding the subject-matter covered by the sale and delivery, and it was not disclosed or knowledge of it brought home to the purchaser, he takes it discharged of the trust.

True, these certificates were not and could not be brought within the commercial law governing bills of exchange, and they were not negotiable paper.

They were simply choses in action which, as in the case of *Baldwin* vs. *Ely*, under the then existing state of things, became a marketable commodity after they were endorsed by the original creditor, and were sold and delivered in the usual course of the trade in them as marketable commodities.

In *Pickering* vs. *Burke*, 15 East., 43, Lord ELLENBOROUGH says: "Strangers can only look to the acts of the parties, and to the *indicia* of property, and not to private communications which may pass between the principal and his broker; and if a person authorizes another to assume the apparent right of disposing of the property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority." And so we may say here, there is no commercial law in these cases separate and distinct from the great principles of equity jurisprudence as

to good faith, notice, giving value, in actions and transactions in the usual course of trade, which can take them out of the control of those principles.

We are here met by a series of decisions in the State of New York, which seem to be based on the rule stated by Lord THURLOW in *Davies* vs. *Austin*, 1 Ves. Jun., 247: "A purchaser of a *chose in action* must always abide by the case of the person from whom he buys." This was a case of equities between the original parties to the chose in action, and this expression must be confined to that state of facts. A very full examination of the cases, which have been relied on by the advocates of the other side of this question, show that they were cases of equities *between the original parties*, or in which the party had notice, excepting only in the State of New York.

While we do not concede this to be the true rule, and find, from the whole current of authorities, that it does not apply to latent equities of which the purchaser had not, and could not, reasonably have had notice, as stated in the case in 10th Barr, we do not deem it necessary, in the present cases, to do more than bring ourselves within the admitted exceptions to the rule stated in *Bush* vs. *Lathrop*, 22 New York, 538, 539. This is the leading case in that State, and it is a little remarkable that no case outside of that State is relied on, or even cited, in support of the principle on which it proceeds, except the one cited from 1 Ves., Jun. But in that case, 22 N. Y., 538, the court says: "The cases in which, from motives of policy, to *promote the currency of certain securities, to prevent fraud, and to aid the vigilant against the careless*, the party to whom the transfer is made is allowed to claim a greater interest than was possessed by the others, are *exceptional*; and it is for the party claiming the protection of an exception to show that it exists in a particular case."

And this court, in the cases of *Baldwin* vs. *Ely*, already cited, and of *Murray* vs. *Lardner*, 2 Wall., 110, has adjudicated the same rule. In the first case, the matter was in relation to "Mexican certificates," which were not negotiable commercial paper, subject to the law merchant, and in the other, was United States Coupon Bonds; both of which were marketable commodities, and to them the court applied the same rules as controlled in cases of latent equities or secret legal titles.

We propose to take these cases out of the category of the New York decisions, if that shall be approved by this court, and to show that they are emphatically "within the exception."

We have collected and collated the pleadings and the proofs to show that the certificates, like those in question, probably from the time of the first issue were thrown upon the market after being endorsed and delivered, and were sold and delivered "as any other security;" and had a market value; and the persons to whose possession they came were by the proper authority, to whom they were presented, recognized as the true owners, and the money paid to them after the certificates had been examined and approved. These facts are brought home to the knowledge of the complainants, and the money actually realized by the defendant, without any notice of a claim on the part of complainants; and we respectfully submit that these facts bring us within the exception admitted in the rule sought to be established in the State of New York.

The authority of *Bush* vs. *Lathrop* was shaken, if not overruled, by the case of *McNeil* vs. *The Tenth Nat. Bank*, 46 New York; and the last shred of it was disposed of and the case overruled in *Moore* vs. *Metropolitan Nat. Bank*, 55 New York, 41.

We are aware that in ~~Guild~~ Cutts *vs.* Guild, 57 New York, 229, the Special Court of Appeals decided exactly the other way. "*Non me tantas componere lites.*" This court will have no difficulty in determining which of these two cases rests most firmly on the principles of jurisprudence as administered in courts of equity.

JOS. H. BRADLEY,
Solicitor for N. A. Cowdrey.

Supreme Court of the United States.

October Term, 1879.

N. A. COWDREY, *Appellant*,
vs.
J. V. W. VANDENBERG ET AL., *Appellees.*
No. 1,075.

N. A. COWDREY, *Appellant*,
vs.
J. V. W. VANDENBERG ET AL., *Appellees.*
No. 1,076.

Brief of Appellees.

JAS. G. PAYNE,
Solicitor for Appellees.

R. O. POLKINHORN, Printer, 632 and 634 D Street, N. W.

Supreme Court of the United States.

October Term, 1879.

N. A. COWDREY, *Appellant*,
vs.
J. V. W. VANDENBERG ET AL., *Appellees.* } No. 1,075.

N. A. COWDREY, *Appellant*,
vs.
J. V. W. VANDENBERG ET AL., *Appellees.* } No. 1,076.

Brief of Appellees.

STATEMENT.

The plaintiffs were contractors, and received from the Auditor of the Board of Public Works certificates in the following form:

OFFICE OF AUDITOR,
BOARD OF PUBLIC WORKS, WASHINGTON, D. C.

No. ——.

I hereby certify that I have this day audited and allowed the account of —— —— (name of contractor) for ———— (description of work) amounting to $——.

————— ————,
Auditor.

The plaintiffs made and delivered to the defendant, M. Mandel, their note for $5,000, payable in six months, and deposited with him as collateral security for the same several of these certificates, among them one, No. 4,351*a*, dated December 6, 1873, issued to the plaintiffs for certain work, amounting to $6,000; and one, No. 390, dated January 21, 1874, issued to the plaintiffs for certain work, amounting to $4,956\frac{80}{100}$. These certificates at the time of their deposit with Mandel were endorsed in blank by the plaintiffs.

At the time of the maturity of their note the plaintiffs were ready to pay the same, and made all possible efforts to do so, but Mandel had left the District, and neither note or securities could be found.

The two certificates particularly described above were traced to the possession of the defendant, N. A. Cowdrey, who was made a party to the suit by an amended bill, and who in his answer states that he did purchase these two certificates in Washington, and that after such purchase, or at the time, he caused to be placed over the endorsement of the plaintiffs, words of assignment to him, Cowdrey, and authority to him to collect to his own use; that he subsequently presented the certificates to the Board of Audit, and the same were exchanged for District 3-65 bonds.

The plaintiffs also made and delivered to the defendant, R. Blumenberg, their note for $3,160, payable in six months, and deposited with him as collateral security for the same, a certificate of the Auditor of the Board of Public Works, No. 4,441, issued to the plaintiffs for work, amounting to $8,451\frac{88}{100}$; the said certificate being, at the time of such deposit, endorsed in blank by the plaintiffs. At the maturity of the note the plaintiffs were ready to pay it, and made every effort to find it for that purpose, but without success.

This certificate came into the possession of the defendant, N. A. Cowdrey, and, according to his answer, was purchased and dealt with by him in the same manner as the certificates above named.

Upon the hearing in the court below in Special Term, decrees against Cowdrey, as to these several certificates, were passed, from which decree he appealed to the said court in General Term where the decrees were affirmed.

The appellees, in these two cases, Nos. 1,075 and 1,076, desires in the outset to note that these cases are in several features materially different from 102 and 441 combined in the appellant's brief.

First. The allegations of the original and amended bills in our cases are either uncontroverted by the answers of Cowdrey, or are sufficiently proven by the testimony taken in support of the bills.

None of the defences set up affirmatively by the answers of Cowdrey are proven, nor is such proof attempted. These defences, with all the affirmative averments of the answers of Cowdrey, are put in issue by the replication of the plaintiffs, and, in the absence of proof, must be dismissed from the consideration of these causes.

Homes vs. *Scruggs*, 94th U. S., R., 22.

Again, if there be, as is claimed in the other two cases, Nos. 102 and 441, proofs offered for the purpose of showing notice to the plaintiffs of the intention of the defendants to purchase the certificates in controversy in 441, and the appellant's assent thereto, and of the purchase of the certificates in both cases in open market, and for full value, all of this proof is absent from the two cases, Nos. 1,075 and 1,076.

The assumptions of the appellant, therefore, based, as he says, upon the pleadings and evidence (see pages 6 and 7

of his brief), are not supported by either said pleadings or evidence.

There is another mistake in the statements of the appellant here, to wit: the assertion that the plaintiffs below had dismissed their bills as to the defendant, the District of Columbia. (See page 11 of appellant's brief.)

None of these bills have ever been dismissed as to any of the defendants. They were pending against all of the defendants, including Cowdrey himself, at the time he presented the certificate of the Board of Audit for redemption by the Sinking Fund Commission, although service of the subpœna upon him, Cowdrey, had not been procured. (See Record, page 8.)

In case No. 1,075, a receipt of the defendant, Mandel, which was produced in proof by the plaintiffs as part of their testimony, and is found upon page 18 of the Record in 1,076, is reproduced in the appellant's brief, on page 8, and is attempted to be construed as a contract of sale of the certificates enumerated. It is treated by the appellant as the contract between Vandenberg & Co. and Mandel. If it were a contract at all it could not be interpreted as anything else than a pledge of the three certificates enumerated as security for the payment of five thousand dollars six months from its date.

The fact as disclosed in the proof is, that Vandenberg & Co. passed to Mandel their note for five thousand dollars, payable in six months, and reciting upon its face that they had deposited in pledge for its payment, these certificates, and Mandel gave to them as evidence against himself of the nature of the transaction, and as protection to them, the paper which the appellant calls a contract of sale to Mandel, a paper given *not to* Mandel at all (the party through whom the appellant here claims title to the certificates), but given *by him to* Vandenberg & Co. for their

protection, and retained by them until offered in proof upon the issue made up in this case.

(See record in 1,076, pages 15 to 18.)

If, as the appellant assumes, Mandel, upon this receipt was not bound to return to Vandenberg & Co. any particular certificates, why should they be enumerated at all in the paper. In any event, Cowdrey was never misled by this writing.

A receipt for the certificate in the other case, pledged by Vandenburgh & Co. for the payment of their other note, was also produced in the testimony of the plaintiffs, and forms one of the exhibits on page 17 of the record in 1,076, and these two receipts taken together in connection with the depositions, show clearly the purpose for which they were given and received, and that they are not, and were never intended to be, any contract or evidence of sale.

The notes given, reciting on their face the pledge of the certificates, were the contracts.

We invite the attention of the court to the form and character of the certificates in question in these causes, and for convenient reference I insert one here, in full. It is the sample of all the rest:

"OFFICE OF THE AUDITOR BOARD OF PUBLIC WORKS,
"WASHINGTON, D. C., *January* 21, 1874.

"I hereby certify that I have this day audited and allowed the account of J. V. W. Vandenberg & Co., for work on S street, between Fourteenth and Fifteenth streets, N. W., amounting to $1,534.80.

"J. C. LAY,
"*Auditor.*

"$1,534.80."

It is not pretended that these are negotiable instruments, the property to which could pass by indorsement and de-

livery. They are neither promises, acceptances, or orders. They are not even obligations of the Board of Public Works or of the District. They are mere statements that the contractor has performed a given amount of work, which, at a given price, amounts to a given sum; statements made by a subordinate officer charged with the ascertainment of these details; an officer created not by any law, but by the appointment and rules of the Board of Public Works itself.

These statements or certificates were only the basis of settlement between the contractor and the District in connection with the contract, but were not of themselves conclusive.

It seems clearly that the legal interest in these securities cannot be transferable by indorsement and delivery. They contain no words of assignability, and in this respect differ from many of the cases cited in the appellant's brief.

We assert then that the property which Cowdrey took in these certificates was no more or greater than that which Mandel or Blumenberg had; that he could acquire no better title than his assignor or the party from whom he acquired them had.

The general and well-settled rule of law is, that no one can give a better title to property than that which he has himself. An exception as to negotiable instruments was created to meet the necessities of trade and commerce.

The rule which applies to these certificates controls not only the title which Vandenburg & Co. could give, but equally the title which Mandel and Blumenberg could give. Cowdrey could take only an equitable title; that is, subject to all the equities between the antecedent parties, to the paper, whether he have notice of such equities or not. The purchaser of such a chose in action must abide by the

case of the person from whom he buys. In other words, the former takes the exact position of the latter.

This was held by Lord Chancellor THURLOW to be "a universal rule."

Davis vs. *Austin*, 1 Vesey, Jr., 247.

See, also—

Williamson vs. *Thompson*, 16 Vesey, Jr., 443;
Glyn vs. *Baker*, 13 East. R., 509;
Andrews vs. *Pond*, 13 Peters, 65;
Mickles vs. *Townsend*, 18 N. Y., 580;
Norton vs. *Rose*, 2 Wash. (Va.), 248;
Rush vs. *Lathrop*, 22 N. Y., 535;
Reeny vs. *Kimball*, 46 " 299;
Shefer vs. *Reilly*, 50 " 66;
Bircleback vs. *Wilkins*, 22 Penna., 26;
Cutts vs. *Guild*, 57 N. Y., 229.

In *Baldwin* vs. *Ely*, 9 Howard, cited by the appellant, the court recognized, with approval, the doctrine laid down in *Williamson* vs. *Thompson*, 16 Vesey, Jr. (above), as the true doctrine, where the certificates are not made assignable by statute or do not contain words of assignability.

Cowdrey is set up here as a *bona fide* purchaser for full value and without notice, but it will be observed that there is not an atom of proof offered by him in support of that position; and from his omission to offer such proof, and from the circumstances surrounding his purchase of these certificates, we are bound to conclude that it was not in his power to produce it.

At the time Cowdrey claimed to have purchased these certificates *in this city*, suits had been commenced in the courts of the District against Mandel and others, based upon their attempted transfer of similar certificates which had been deposited with them in pledge. Mandel and Blumenburg had, in fact, absconded from the District after

disposing of large quantities of these securities, and all of this species of property rested under a cloud of suspicion and doubt, putting dealers on inquiry.

Reliance is also placed by the appellant upon an alleged custom of the sale of these securities by endorsement and delivery in this District, but this, as well as other material assumptions of his, is entirely unsupported by proof.

There has been no attempt to establish by evidence the existence of such a custom, and had there been any offer of such evidence, it would have been met by abundant proof that the prevalent custom as to these certificates in the District of Columbia was that of hypothecation or pledge, not sale.

In the absence, therefore, of any evidence as to the alleged custom, it is unnecessary to discuss its legal aspect and effect, although this court has said that usage or custom cannot be set up in contravention of established law.

Barnard vs. *Kellogg*, 10 Wallace, 383;
Vermilye vs. *Express Co.*, 21 Wallace, 146.

If it be contended that the plaintiffs were estopped by their endorsement, it is sufficient to reply that the presumption of law is that both the plaintiffs, in putting their names on the paper, and Cowdrey, in taking it with that endorsement, acted with knowledge of its legal effect, its extent, and its limit.

If all the legal defenses set up by the appellant were true, he is not here as a *bona fide* holder. It cannot be seriously contended that the mere possession of such choses in action carries with it all necessary presumptions. The burden of proof is upon him, and he has failed to meet it.

The equities of the appellant can in no event be better or more meritorious than those of the appellees, while, as matter of fact, the latter are shown to be sufferers, while the former is not.

JAS. G. PAYNE,
Solicitor for Appellees.

In Supreme Court of the United States.

October Term, 1879.

N. A. Cowdrey,
Appellant,

vs.

J. B. Vandenburg and others,
Appellees.

Two cases.
Nos. 1075 & 1076.

Reply of the Appellant to the Brief filed on the part of Appellees.

First. As to whether the answer of defendant, Cowdrey, are or not responsive to the charges and allegations of the bills, and to the call on him, in the bills, to show cause, &c.

It seems to be supposed that the word discovery, in the bill, is necessary to make it a bill for a discovery.

Is it so? Every call on the defendant to answer and show facts, supposed to be peculiarly within his knowledge, is a call for a discovery, and the answer is, thereby, made evidence, notwithstanding there may not be any direct charge or allegation in the bill, to which the facts, in the answer, are a special reply.

In this case, the bills charge and allege (paragraph 11) that the pledgees "secretly and without the consent or knowledge of the plaintiffs, or either of them, disposed of, or delivered the said certificates to some person or persons

to them unknown, who *were conniving and co-operating with him* for the wrongful and fraudulent purpose aforesaid, and by whom, or by some other person or persons, to the plaintiffs unknown, the said certificates are now wrongfully held or claimed," &c.

Again, at paragraph 19, the bills proceed: that the defendants are "converting the same to his or their own use" * * "to injure, wrong and defraud the plaintiffs as aforesaid," and, in the 21st par., "to the end, therefore, that (the defendants), if they can, *may show why* the plaintiffs should not have the relief herein sought and prayed, *and* may, upon their respective and corporal oath," &c., answer the several interrogatories, &c.

Now, here is a distinct allegation of fraud and confederation, a demand for a disclosure of facts peculiarly within the knowledge of the defendant, *and, also*, and in addition thereto, that the defendant shall answer certain interrogatories.

The first branch is fully denied by the answer, and not a scintilla of evidence taken to support the allegations, although the defendant, in his answer, at p. 13, had *disclosed* that "he purchased the certificates from a *well-known* and respectable business man of the city of Washington, to wit, Mr. L. L. Crounse, who resided and had an office in said city." It is, therefore, settled that there was no fraud or confederacy on the part of the defendants with the pledgees.

The second matter is that, in addition to the denial of fraud and conspiracy, he "*shall show*," if he can, why the plaintiffs shall not have the relief prayed for. What does this mean? That they shall argue the right of the plaintiffs? Certainly not that. Can it mean more or less than that he shall discover such facts as may show to the court his title to the certificates? The form of words in which they are required to do this is wholly immaterial. How can he show what he is required to show, but, in answer to the

demand thus searching his conscience, disclose every fact tending to show that he rightfully claimed the certificates, as against the original title of the plaintiffs, and trace the transmission of that title to himself by a *bona fide* purchase, for full value in open market, the certificates being endorsed by complainants, and that such certificates, so endorsed, were marketable commodities in the city where complainants resided.

In my judgment, this is precisely what he was called upon "to show," if he could, and is the discovery sought by the bill, and therefore evidence.

The case of Seitz and Mitchell, when carefully considered, instead of being an authority against me, by the clear estimplication from the reasoning of Mr. Justice STRONG, supports the views I have presented.

If a fact essential to the determination of the complainant's case is stated, or charged in the bill to rest in the knowledge of the defendant only, or exist of necessity within his knowledge only, and is, consequently, the subject of the discovery sought by the bill, a precise allegation is necessary.

Cooper's Eq., 6; How. Eq. Pr., § 255; 1 Dan'l Chan., 3d Am. Ed., 366.

Here complainant sets up his title, and alleges that defendant is claiming the scrip, and calls upon defendant *to show* why it should not be decreed to him.

Second. No attempt was made in my original brief to set up any custom as to the sale of these certificates. The point intended to be made, and, as I still think, presented with sufficient distinctness, was that, in point of fact, the certificates, *when endorsed by* the party to whom they were issued, passed from hand to hand as marketable commodities; that they were largely dealt in, and although that did not alter the legal rights of the parties, yet the fact being brought to the knowledge of complainants that, when

they endorsed them, they might be set afloat, and when they sought relief in equity from the consequences of their own negligence, they ought not to be heard. The point was, notice to the complainants of this course of dealing as a fact; not to establish any custom.

Third. In my original brief, it is said on p. 23: "A very full examination of the cases which have been relied on by the advocates of the other side of this question shows that they were cases of equities between the original parties, or in which the party had notice, excepting only the State of New York."

I reiterate that statement, and now say there is not to be found in the English reports, and so far as I know—and I have laboriously sought for one in the American Reports—a single case in equity in which, in a case of the assignment of a chose in action, (except upon some ground of fraud or notice, and except in the State of New York,) relief has been granted to any intermediate party on the ground of equities affecting the assignment, which equities did not exist between the original parties or grow out of the original transaction.

A brief notice of the cases cited on appellee's brief will show this—

Williamson vs. *Thompson*, 16 Vez., Jr., 443, was a clear case of notice, and substantially of fraud.

Glynn vs. *Baker*, 13 Earl, 509, was a case at law.

Andrews vs. *Pound*, 13 Pet., 65, was as to equities between the original parties, &c.

Norton vs. *Rose*, 2 Wash. V., 248, was solely a case of equities between the maker and *obligee* of a sealed obligation, set up as a defence against an assignee.

Bricleback vs. *Wilkins*, 22 Penn., 26, was a suit at law brought by the holder of a sealed note, not a negotiable instrument, purchased when it was overdue; protested for non-payment, and notice given to the payee, who endorsed

it under a parol agreement that he should not be held liable, and his endorsee had transferred it to the plaintiff, but without notice; of course, he could not recover.

In *re* European Bank, 5 L. R., ch. app. 358, was a case in which an officer of the O. C. Bank stole money from the bank and invested it in bills on the European Bank. He afterwards sold the bills, *when they were overdue* to the E. C. Bank. The European Bank filed a bill of interpleader against the two other banks, and at p. 362, the court says: "The bills were overdue when the E. C. Bank took them; there were equities affecting the bills, and the E. C. Bank had no better title, legal or equitable, than D. P. (the thief) had from whom they bought * * *. In this case *there is an equity attaching directly to the bills.* The result is, therefore, that the O. C. Bank may follow their money into the bills of exchange, in the possession of the E. C. Bank, precisely in the same way as though D. P. had not parted with them."

I submit that, as Mr. Ch. J. Taney said of *Williamson* vs. *Thompson*: "The court determined that he, the defendant, took the East India certificate as the agent of the original payee and for his use, but upon evidence which presented a case altogether unlike the one now before us."

Fourth. One word as to the character of these certificates, and the effect of the endorsement.

The bill sets up that they were recognized by the Act of Congress as valuable papers; that when these were presented to the Board of Audit, that Board recognized the holder as the owner—we say when they were endorsed—and in his answer Cowdrey says (pp. 11, 12), in reply to interrogatory (page 5 of bill): "The certificates are or were as above described, that is to say, properly assigned and transferred, in writing, to this defendant." This is undoubtedly evidence, and uncontradicted. The form of the assignment is (p. 11), "For value received, the within debt is assigned

and transferred to N. A. Cowdrey, who is authorized to collect the same for his own use;" and at p. 13 (last par.), he further says, he caused to be written or printed upon the back of each of said certificates, over the endorsement of the plaintiff, the endorsement above given.

It is clear then, that the certificates were valuable instruments, and capable of assignment, and that such an assignment as Cowdrey wrote over plaintiff's signature entitled him to receive the bonds, which he did receive, for them; that he had a right to fill up the endorsement in the manner he did, and the endorsement of plaintiff, imported the receipt of a valuable consideration therefor.

JOS. H. BRADLEY,
Solicitor for Appellant.

Supreme Court of the United States.

October Term, 1879.

N. A. COWDREY, *Appellant*,

vs.

J. V. W. VANDENBERG ET AL., *Appellees.* } No. 1,075.

N. A. COWDREY, *Appellant*,

vs.

J. V. W. VANDENBERG ET AL., *Appellees.* } No. 1,076.

JAS. G. PAYNE,
Solicitor for Appellees.

R. O. POLKINHORN, Printer.

Supreme Court of the United States.

October Term, 1879.

N. A. COWDREY, *Appellant*,
vs.
J. V. W. VANDENBERG ET AL., *Appellees.*
No. 1,075.

N. A. COWDREY, *Appellant*,
vs.
J. V. W. VANDENBERG ET AL., *Appellees.*
No. 1,076.

Brief of Appellees.

STATEMENT.

The plaintiffs were contractors, and received from the Auditor of the Board of Public Works certificates in the following form:

OFFICE OF AUDITOR,
BOARD OF PUBLIC WORKS, WASHINGTON, D. C.

No. ——.

I hereby certify that I have this day audited and allowed the account of ——— ——— (name of contractor) for ——————— (description of work) amounting to $———.

———— ————,
Auditor.

The plaintiffs made and delivered to the defendant, M. Mandel, their note for $5,000, payable in six months, and deposited with him as collateral security for the same several of these certificates, among them one, No. 4,351*a*, dated December 6, 1873, issued to the plaintiffs for certain work, amounting to $6,000; and one, No. 390, dated January 21, 1874, issued to the plaintiffs for certain work, amounting to $4,956\frac{80}{100}$. These certificates, at the time of their deposit with Mandel, were endorsed in blank by the plaintiffs.

At the time of the maturity of their note, the plaintiffs were ready to pay the same, and made all possible efforts to do so, but Mandel had left the District, and neither note or securities could be found.

The two certificates particularly described above were traced to the possession of the defendant, N. A. Cowdrey, who was made a party to the suit by an amended bill, and who, in his answer, states that he did purchase these two certificates in Washington, and that after such purchase, or at the time, he caused to be placed over the endorsement of the plaintiffs words of assignment to him, Cowdrey, and authority to him to collect to his own use; that he subsequently presented the certificates to the Board of Audit, and the same were exchanged for District 3 65 bonds.

The plaintiffs also made and delivered to the defendant, R. Blumenburg, their note for $3,160, payable in six months, and deposited with him as collateral security for the same, a certificate of the Auditor of the Board of Public Works, No. 4,441, issued to the plaintiffs for work, amounting to $8,451\frac{88}{100}$; the said certificate being, at the time of such deposit, endorsed in blank by the plaintiffs. At the maturity of the note, the plaintiffs were ready to pay it, and made every effort to find it for that purpose, but without success.

This certificate came into the possession of the defendant, N. A. Cowdrey, and, according to his answer, was purchased and dealt with by him in the same manner as the certificates above named.

Upon the hearing in the court below in Special Term, decrees against Cowdrey, as to these several certificates, were passed, from which decree he appealed to the said court in General Term, where the decrees were affirmed.

The appellees in these two cases, Nos. 1,075 and 1,076, desire in the outset to note:

That the allegations of the original and amended bills are either uncontroverted by the answers of Cowdrey, or are sufficiently proven by the testimony taken in support of the bills.

That none of the defences set up affirmatively by the answers of Cowdrey are proven, nor is such proof attempted. These defences, with all the affirmative averments of the answers of Cowdrey, are put in issue by the replication of the plaintiffs, and in the absence of proof, must be dismissed from the consideration of these causes.

Humes vs. *Scruggs* 94th U. S., R., 22.

Among these affirmative averments, is the claim of Cowdrey; that he is a *bona fide* purchaser of these certificates for value and without notice.

It will be observed that there is no proof whatever offered by him in support of this averment.

It is conceded that, where the answer is expressly responsive to the allegations of the bill, it will stand, unless overcome by sufficient proof.

The bills in these cases allege, that the defendant Mandell, (and the defendant Blumenberg) secretly, and without the knowledge of the plaintiffs, disposed of the said certificates to some person or persons to the plaintiffs unknown,

who were conniving and co-operating with him, the said Mandell (and Blumenberg) to defraud the plaintiffs, and were wrongfully holding and claiming the said certificates, and using, or attempting to use, the same.

See record, page 4.

The bill then calls upon the defendant to answer certain specific interrogatories, which may be found upon page 5 of the record.

It is inquired: what disposition has been made of the certificates?

Whether they have been transferred, and if so, when, to whom, and by whom?

Whether they have been presented to the Board of Audit, and what the said board has done, or proposes to do with them.

Whether any other certificates have been issued in lieu of them, and whether they have been exchanged for bonds "of the District?"

This is the scope and extent of the interrogative portion of the bill.

(See page 5 of the record, paragraph **21** of bill, and interrogatories.

The defendant (below) Cowdrey, answers the bill by

1st. Denying the allegations contained in its formal parts.

Denying the alleged nature of the transaction between the plaintiffs below and the defendant, Mandell (and Blumenberg).

Denying the allegation of the bill, that the said certificates were not negotiable.

Disclaiming any knowledge of another certificate.

Denying the allegation that the plaintiffs below are ready "and able to pay their notes;" and he then answers the several specific interrogatories as follows:

That these certificates were presented by him to the Board of Audit, and that said Board audited said certificates and cancelled the same.

That he has no knowledge of any other transfer or possession of said certificates.

That he does not know where they are now.

That they were presented to the Board of Audit properly assigned and transferred to him.

That the said Board has audited them, and given certificates of said audit.

That the said certificates were properly assigned and transferred in writing to him.

That the certificate of the Board of Audit was signed by the Comptroller of the District.

That it was presented to the Sinking Fund Commissioners in December, 1874, and bonds of the District received "therefor by him, Cowdrey."

This completes the answers to the specific interrogatories.

Cowdrey then goes on to say that, except so far as he has denied or omitted various allegations in the said bill of complaint contained, he has no information, knowledge or belief on the other matters and things therein contained.

(See page 12 of Record.)

So far, the answer may be deemed responsive to the averments of the bill.

Then Cowdrey goes on with affirmative averments, and claims to have purchased the said certificates in the District of Columbia, and to have paid the market value for the same (not specifying what that was), and sets up a custom prevalent as to the transfer of similar certificates, together with various inferences of fact and law.

(See pages 12, 13 and 14 of Record.)

In the brief of the plaintiff in error, the order of Cow-

drey's answer is reversed, and the latter portion, the affirmative averments, is made to precede the portion which is responsive to the bill.

(See page 3 of brief of plaintiff in error.)

It is apparent from Cowdrey's answer, as it was prepared, that *he* did not conceive that its averment as to the purchase of these certificates for value, the custom of transferring them, &c., were responsive to the bill. In express terms he closes the responsive part of his answer, and then takes a new departure into the field of new and affirmative dedefences.

I submit that, as to this latter portion, the answer is not evidence under any rule of law or equity.

It is claimed by the plaintiff in error that the bills here are bills of discovery, and that the defendants to the bill were charged with fraud and confederacy, and were called upon to show why the plaintiffs in the bill should not have the relief prayed.

That his answer was responsive to the charges of confederacy and fraud, and showed why the relief prayed should not be granted.

That it was, therefore, responsive, and the facts set up in it are evidence.

Nowhere in the bill is the defendant asked in what manner, or under what circumstances, he acquired these certificates. He is not asked to disclose his title.

It is inquired where they are? What disposition has been made of them—whether they have been converted into bonds? That is all.

The call upon the defendant to show cause why the plaintiffs should not have the relief sought, sets forth the specific interrogatories which the defendant answers, and in neither interrogatories or answers is there anything

touching the *bona fides* of his acquirement, or possession of the certificates.

It is error to call the bill here one of discovery. The term is not used, unless it be in the 21st paragraph, in which the defendants, *when discovered*, to show cause why the plaintiffs should not have the relief prayed, are called upon to answer the interrogatories which are there set out.

The case of *Baldwin* vs. *Ely*, the only one cited by the plaintiff in error on this point, is not analagous.

There the bill, in express terms, called upon Ely to show how the property in question was procured by him, and *for what consideration*, &c.

There are numerous cases in which this question is discussed, and the rule applied. The latest we can find is that of *Seitz* vs. *Mitchell*, 94 U. S., 580. There the bill alleged that Seitz, knowing of the existence of certain judgments against him, purchased property, the deed for which, by conspiracy with his wife, the other defendant, to delay, hinder, and defraud the plaintiff, a judgment creditor, he procured to be made to her; the purchase money was paid by Seitz with money earned by himself, to which his wife had no title.

The answer of the wife denied that Seitz purchased the property or paid for the same, and denied all fraud. She then averred, that she, in her own name and in her own right, purchased the property and took the conveyance; that she paid the purchase money out of her own means, and money procured wholly by herself and not from her said husband, or through him or his exertions. She rested on her answer.

The court say in that case, that the denials of the answer that Seitz purchased the property or paid for the same, or owned or advanced the money to pay for the same, are responsive to the bill, but that the other averments of the

answer were not responsive, and therefore should have been sustained by other proof.

That ruling, we submit, disposes of the answer of Cowdrey, and disposes of the assumptions that he purchased the certificates in the regular course of trade *bona fide*, and paid the full market value therefor, that they were a marketable commodity by endorsement and delivery, and the subject largely of sale in this District and other places.

The plaintiffs below proved the deposit of the certificates in pledge, and their readiness and efforts to redeem them, and Cowdrey admits his possession of them, and does not in any sufficient manner prove himself a holder, *bona fide*, and for value.

It is conceded that they are not negotiable instruments. The burden of proof therefore is on the holder, and he has failed to meet it.

The case, then, as to proof, stands thus: The plaintiffs were the owners of these certificates; Mandel (and Blumenberg) acquired the title and possession of a pledgee; the certificates are found in the possession of Cowdrey, he claiming title to them without explanation. The plaintiffs, were and are ready to redeem according to the contract of pledge. Cowdrey must stand as Mandel (and Blumenberg) and be dealt with as they would be.

The decree of the court below gave Cowdrey credit for the amount of the indebtedness which the certificates were pledged to secure, with interest, and found against him for the excess of value.

The notes given, reciting on their face the pledge of the certificates, were the contracts, and showed the title and ownership of the defendants.

We invite the attention of the court to the form and character of the certificates in question in these causes, and for convenient reference I insert one here in full. It is the sample of all the rest:

"OFFICE OF THE AUDITOR BOARD OF PUBLIC WORKS.
"WASHINGTON, D. C., *January 21, 1874.*

No. 360.

"I hereby certify that I have, this day, audited and allowed the account of J. V. W. Vandenberg & Co., for work on S street between Fourteenth and Fifteenth streets, N. W., amounting to $1,534.80.

"J. C. LAY,
"*Auditor.*

"$1,534.80."

It is not pretended that these are negotiable instruments, the property to which could pass by indorsement and delivery. They are neither promises, acceptances, or orders. They are not even obligations of the Board of Public Works or of the District. They are mere statements that the contractor has performed a given amount of work, which, at a given price, amounts to a given sum; statements made by a subordinate officer charged with the ascertainment of these details; an officer created not by any law, but by the appointment and rules of the Board of Public Works itself.

These statements or certificates were only the basis of settlement between the contractor and the District in connection with the contract, but were not of themselves conclusive.

It seems clearly that the legal interest in these securities cannot be transferable by indorsement and delivery. They contain no words of assignability, and, in this respect, differ from many of the cases cited in the appellant's brief.

We assert, then, that the property which Cowdrey took in these certificates was no more or greater than that which Mandel or Blumenberg had; that he could acquire no better title than his assignor or the party from whom he acquired them had.

The general and well-settled rule of law is, that no one

can give a better title to property than that which he has himself. An exception as to negotiable instruments was created to meet the necessities of trade and commerce.

The rule which applies to these certificates controls not only the title which Vandenberg & Co. could give, but equally the title which Mandel and Blumenberg could give. Cowdrey could take only an equitable title; that is, subject to all the equities between the antecedent parties to the paper, whether he have notice of such equities or not. The purchaser of such a chose in action must abide by the case of the person from whom he buys. In other words, the former takes the exact position of the latter.

This was held by Lord Chancellor THURLOW to be "a universal rule."

Davis vs. *Austin*, 1 Vesey, Jr., 247.

See, also—

Williamson vs. *Thompson*,16 Vesey, Jr., 443;
Glyn vs. *Baker*, 13 East. R., 509;
Andrews vs. *Pond*, 13 Peters, 65;
Mickles vs. *Townsend*, 18 N. Y., 580;
Norton vs. *Rose*, 2 Wash. (Va.), 248;
Rush vs. *Lathrop*, 22 N. Y., 535;
Reeny vs. *Kimball*, 46 " 299;
Shefer vs. *Reilly*, 50 " 66;
Bircleback vs. *Wilkins*, 22 Penna., 26;
Cutts vs. *Guild*, 57 N. Y., 229.

In *Baldwin* vs. *Ely*, 9 Howard, cited by the appellant, the court recognized, with approval, the doctrine laid down in *Williamson* vs. *Thompson*, 16 Vesey, Jr. (above), as the true doctrine, where the certificates are not made assignable by statute, or do not contain words of assignability.

It is claimed that the only equities which the courts will sustain are those existing between the original parties.

While it happens that the equities sought to be enforced

are, in a large majority of reported cases, between the original parties, there are cases involving the equities of intermediate parties.

In re European Bank, 5 L. R. Ch., App. 358, was a case of overdue bills of exchange, and the equities sustained were those of an intermediate holder.

Bush vs. *Lathrop*, 22 N. Y., 535, was a case of the equities of assignors, and although that case, after being followed in others, was apparently departed from in *Moore* vs. *Bank*, 55 N. Y., 41, it was completely re-established in *Cutts* vs. *Guild*, 57 N. Y., 229.

In *Bircleback* vs. *Wilkins*, 22 Penna., 26, a note, not negotiable, was endorsed in blank by the payee, with an agreement as to his liability.

It was afterwards received by the holder, without notice, but he did not prove that he was a holder for value. Held that he took subject to the equities between the payee and his endorsee.

It will be observed that this latter case has a two-fold application, here.

The language used by the courts, in a large majority of all the cases, is significant.

"The purchaser must abide by the case of the person from whom he buys.

"The assignee takes only the title and interest of his assignor.

"The party taking is in no better condition than the person from whom he takes," &c., &c.

Words have meaning, and we are not to presume their idle use by courts.

The sum of the law and of the authorities upon this point is well, we think, correctly stated in the notes to—

Miller vs. *Race*, Smith's Leading Cases: Vol. 1, pt. 2, p. 814,

as follows:

"The rule is—that, if the paper is entitled to the name of a negotiable instrument, transferable by delivery, and capable of being sued on by the party holding it *pro tempore*, the property in it passes to a *bona fide transferee for value*; but if either of these requisites be wanting, delivery of it will not pass the property to a vendee, however *bona fide*, if the transferor himself have not a good title to it."

In the case of *Ballard Paving Co.* vs. *Mandel*, 2 McArthur, R. 341, the unanimous judgment of the Supreme Court of the District of Columbia is fully set forth upon most of the points involved here.

Cowdrey is set up here as a *bona fide* purchaser for full value and without notice, but it will be observed that there is not an atom of proof offered by him in support of that position; and from his omission to offer such proof, and from the circumstances surrounding his purchase of these certificates, we are bound to conclude that it was not in his power to produce it.

At the time Cowdrey claimed to have purchased these certificates *in this city*, suits had been commenced in the courts of the District against Mandel and others, based upon their attempted transfer of similar certificates which had been deposited with them in pledge. Mandel and Blumenburg had, in fact, absconded from the District after disposing of large quantities of these securities, and all of this species of property rested under a cloud of suspicion and doubt, putting dealers on inquiry.

Reliance is also placed by the appellant upon an alleged custom of the sale of these securities by endorsement and delivery in this District, but this, as well as other material assumptions of his, is entirely unsupported by proof.

There has been no attempt to establish by evidence the existence of such a custom, and had there been any offer

of such evidence, it would have been met by abundant proof that the prevalent custom as to these certificates in the District of Columbia was that of hypothecation or pledge, not sale.

Indeed, it appears in proof that Vandenburg & Co., extensive contractors and recipients of certificates, never sold one but pledged to them, as was done in these cases.

In the absence, therefore, of any evidence as to the alleged custom, it is unnecessary to discuss its legal aspect and effect, although this court has said that usage or custom cannot be set up in contravention of established law.

Barnard vs. *Kellogg*, 10 Wallace, 383;
Vermilye vs. *Express Co.*, 21 Wallace, 146.

If it be contended that the plaintiffs were estopped by their endorsement, it is sufficient to reply that the presumption of law is that both the plaintiffs, in putting their names on the paper, and Cowdrey, in taking it with that endorsement, acted with knowledge of its legal effect, its extent, and its limit.

If all the legal defenses set up by the appellant were true, he is not here as a *bona fide* holder. It cannot be seriously contended that the mere possession of such choses in action carries with it all necessary presumptions. The burden of proof is upon him, and he has failed to meet it.

The equities of the appellant can in no event be better or more meritorious than those of the appellees, while, as matter of fact, the latter are shown to be sufferers, while the former is not.

JAS. G. PAYNE,
Solicitor for Appellees.